89-205

No. - .

Supreme Court, U.S.
FILED
AUG 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

ROBERT GUINEY,
PETITIONER,

v.

FRANCIS M. ROACHE,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

FRANK J. MCGEE,*
STEVEN M. GUINEY,
MCGEE & PHILLIPS,
1920 Ocean Street,
Marshfield, Massachusetts 02050.
(617) 834-4690

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether the United States Court of Appeals for the First Circuit, in deciding that a Boston police department rule which would compel all Boston police officers to submit to continuous, random, unannounced, warrantless and en masse drug testing by urinalysis in the absence of any probable cause or reasonable individualized suspicion of any drug use or other wrongdoing, negligence or dereliction of duty, does not violate said employees' Fourth Amendment rights to be free from unreasonable searches and seizures, has decided an important question of federal law which has not been, but should be, settled by this Court.

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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

ROBERT GUINEY,
PETITIONER,

v.

FRANCIS M. ROACHE,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner, Robert Guiney, individually and as he is the president of, and representative of, the Boston Police Patrolmen's Association, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered May 11, 1989, and amended on May 17, 1989.

Opinions Below.

The May 11, 1989, Judgment and Opinion of the court of appeals is reported at 873 F.2d 1557 and appears at Appendices

D and E, *infra* at 4a-7a. The May 17, 1989, Order of the court of appeals amending the above opinion appears at Appendix C, *infra* at 3a. The Judgment and Opinion of the district court dated May 18, 1988, is reported at 686 F. Supp. 956 and appears at Appendices F and G, *infra* at 8a-25a.

The prior Opinion of the court of appeals reversing the district court's application of the doctrine of abstention is reported at 833 F.2d 1079 and appears at Appendix I, *infra* at 27a-38a. The original Opinion of the district court invoking the doctrine of abstention is reported at 654 F. Supp. 1287 and appears at Appendix L, *infra* at 45a-83a. The Opinion of the district court on reconsideration pending appeal with respect to the propriety of its invocation of the doctrine of abstention is not reported but appears at Appendix J, *infra* 39a-43a.

Jurisdiction.

The judgment of the court of appeals (App. D, *infra* at 4a) was entered on May 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The Fourth Amendment to the Constitution of the United States provides in pertinent part as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. . . .

Statement of the Facts.

On April 24, 1986, the Boston Police Department issued Rule 111 which, in pertinent part, required all departmental personnel to submit to urine testing for illegal drug use on a random, without cause, basis. The petitioner, Robert Guiney, president of the Boston Police Patrolmen's Association and acting as its representative, filed a complaint in the United States District Court for the District of Massachusetts against the Boston Police Commissioner, the respondent Francis M. Roache, requesting among other things, that the district court declare that such random drug testing program violated the Fourth and Fourteenth Amendments to the United States Constitution.

The evidence before the district court consisted primarily of Rule 111 and a stipulation by which the parties agreed on a statement of the material facts. The entire text of Rule 111 and the above-mentioned stipulation is reproduced in the March 6, 1987 Opinion of the district court. See *Guiney* v. *Roache*, 654 F. Supp. at 1289-94 (appearing at Appendix L, *infra* at 46a-58a.

After initially entering an Opinion and Judgment invoking the *Pullman* abstention doctrine (see Appendices K and L, *infra* at 44a-83a), which decision was reversed on appeal by the petitioner (see Appendix H and I, *infra* at 26a-38a), the district court entered an Opinion and Judgment declaring the random drug testing provision in Rule 111 to be unconstitutional. Appendix F at 8a-25a.

The respondent Police Commissioner appealed said decision to the United States Court of Appeals for the First Circuit. Following oral argument in February, 1989 before the court of appeals, but prior to any decision being rendered, this Court decided the cases of *National Treasury Employees* v. *Von Raab*, ___ U.S. ___, 109 S.Ct. 1384 (1989) and *Skinner* v. *Railway*

Labor Executives Association, ___ U.S. ___, 109 S.Ct. 1402 (1989). Relying on the above-cited cases and reasoning that "we can find no relevant distinction between a customs officer and a police officer," the court of appeals held the police department's drug testing rule to be constitutional to the extent that it applied to members of the department who carry firearms and to those who participate in drug interdiction. Appendices C, D and E at 3a-7a. As the rule appeared "to apply to other members of the Department who may not carry firearms or enforce the drug laws," the court of appeals ordered the case to be remanded to the district court to determine "who these latter employees may be or what may be the rationale for including them in the program." Appendix E at 7a.

Reasons for Granting the Petition.

In the recent companion cases of *Skinner* v. *Railway Labor Executives Association*, ___ U.S. ___, 109 S.Ct. 1402, ___ L.Ed.2d ___ (1989) and *National Treasury Employees Union* v. *Von Raab*, ___ U.S. ___, 109 S.Ct. 1384, ___ L.Ed.2d ___ (1989), this Court was presented with its first opportunity to address the issue of drug testing by urinalysis in the public employment context. As set forth by Justice Marshall in his dissent in *Skinner*, *supra*, joined by Justice Brennan, the majority of the Court in *Skinner*, *supra*, purported "to limit its decision to post-accident testing of workers in safety-sensitive jobs, [109 S.Ct.] at 1414, much as it limits its holding in the companion case to testing of transferees to jobs involving drug interdiction or the use of firearms." *Skinner*, *supra*, 109 S.Ct. at 1423 (citing the *Von Raab* case, *supra*). The instant case, however, involves neither the post-accident testing of specific employees who are involved in accidents nor does it involve the

testing of specific employees who seek promotion or transfer to safety-sensitive positions, which employees might decline said search and seizure and remain in their present position with no adverse inference being drawn from their refusal to allow or consent to such invasion of their privacy. Rather, the instant case involves the random and compelled (under threat of discharge and loss of a protected property interest) drug testing by urinalysis of all of the presently-employed police officers of a major city's police department in the absence of any accident or seeking of any promotion or transfer, and in the absence of any probable cause or even suspicion of any drug use or other wrongdoing or dereliction of duty. Such proposed compelled bodily intrusions implicate, as the Court specifically recognized in both *Schmerber* v. *California*, 384 U.S. 757 (1966) and *Winston* v. *Lee*, 470 U.S. 753, 760 (1985), perhaps "the most personal and deep-rooted expectations of privacy."

Undoubtedly, the government has a vital interest in promoting public safety in its employment of individuals just as it does in promoting public safety upon its roads. As the Supreme Court in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), stated:

> . . . We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road *and are physically qualified to operate a motor vehicle*. . . .

440 U.S. at 658. (Emphasis added). (Footnote is omitted).

Despite the minimal intrusion of a spot check, however, despite the government's vital interest in promoting public safety, and despite the governmental requirements, as reasonable conditions of travel upon the state's roads, of periodic vehicle inspections and physical and mental examinations of drivers, the Court, in *Delaware* v. *Prouse, supra*, held that "except in those situations in which there is *at least articulable and reasonable suspicion* that a motorist is unlicensed or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment." 440 U.S. at 663. (Emphasis added). In dicta, the Court then went on to state that its above holding did not "preclude the State of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstitutional exercise of discretion" and expressly set forth "[q]uestioning of all on-coming traffic at roadblock-type stops" as "one possible alternative." *Id.*

Subsequent to the Supreme Court's decision in *Delaware* v. *Prouse*, *supra*, states, such as Massachusetts, have adopted roadblock-type questioning procedures under strict guidelines to detect, for example, drunk driving. See e.g., *Commonwealth* v. *Trumble*, 396 Mass. 81, 86, 483 N.E.2d 1102, 1105 (1985) ("Clearly there exists a strong public interest in reducing the 'carnage caused by drunk drivers'." [quoting *South Dakota* v. *Neville*, 459 U.S. 553, 558, 103 S.Ct. 916, 920, 74 L.Ed.2d 748 (1983).]); *Commonwealth* v. *McGeoghegan*, 389 Mass. 137, 143, 449 N.E.2d 349, 353 (1983) ("However, we are well aware of the public's interest in reducing the incidence of drunk driving in a way that is consistent with the important interest of individuals in being free from unreasonable intrusion on their personal security.").

While the Massachusetts Supreme Judicial Court, however, has upheld, under strict guidelines, roadblocks which involve brief detention and questioning to detect drunk drivers, the petitioner is unaware of (and neither the respondent nor amicus below has cited) any case allowing even a breathalyzer (never mind a urinalysis) test to be performed on a driver or operator of a vehicle without, at least, articulable and reasonable suspicion based on, among other things, the questioning and observation of the driver during the time of his or her brief roadblock detention. In fact, Massachusetts, by statute, only allows the compulsion of a breathalyzer or blood test, under threat of temporary loss of license, where the operator "is *arrested* for operating a motor vehicle while under the influence of intoxicating liquor." Mass. G.L. c. 90, § 24(f) (emphasis added). Thus, in Massachusetts anyway, probable cause is still required before an operator of a motor vehicle can be compelled to take even a breathalyzer test.

With regard to blood testing, this Court has held that not only must there be an arrest based on probable cause, but, in the absence of a judicial warrant, there must be a clear indication that the desired evidence will be found upon such testing. In *Schmerber* v. *California, supra,* the Court stated:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be found. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

384 U.S. at 769-770.

Moreover, the penalty imposed in Massachusetts upon one who refuses to submit to a breathalyzer or blood test, even though probable cause exists, is merely a temporary (ninety day) loss of license — not, as involved in the instant case, a permanent loss of employment without even the hint of any individualized suspicion to demand such intrusive testing in the first place.

Surely there exists a risk that a particular police officer, like any other member of society, may be involved with drugs, but this society, unlike others, has always been willing to accept certain risks in exchange for the freedom it so cherishes — but which appears to be so rapidly dwindling. The petitioner would submit that society is no more willing now, than it was when the Fourth Amendment was written and adopted, to accept a compelled, without-cause governmental intrusion on the privacy and sanctity of one's body. This is especially true where, as here, such intrusion, which this Court has characterized as implicating one's "most personal and deep-rooted expectation of privacy" (*Winston* v. *Lee*, *supra*, 470 U.S. at 760) is weighed against the exaggerated fears set forth by the respondent in the instant case. As Justice Brennan, in an opinion joined by Justice Marshall concurring in part and dissenting in part to the Court's decision in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), stated in disagreeing with the Court's adoption there of a "reasonable suspicion" standard with regard to the search of a student's handbag by school authorities:

> Moved by whatever monetary evil has aroused their fears, officials — perhaps even supported by a majority of citizens — may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of "the

> right to be left alone — the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 O.Ed. 944 (1928) (Brandeis, J., dissenting). That right protects the privacy and security of the individual unless the authorities can cross a specific threshold of need, designated by the term "probable cause."

469 U.S. at 361-62.

In the instant case, the respondent seeks to compel not only a *bodily* search (as opposed to a search of a student's purse or handbag), but a search lacking not only "probable cause" but without "reasonable suspicion" as well. Moreover, such intrusive bodily searches are not to be conducted on specific individuals on a one-time basis on the happening of a triggering event (such as workers involved in an accident as in the *Skinner* case, *supra*, or employees seeking transfer or promotion as in the *Von Raab* case, *supra*), but rather such intrusive bodily searches are to be conducted on all presently-employed members of the department, under threat of discharge and loss of a protected property interest, on a continuous and random basis. Contrary to the decision of the court of appeals below, the petitioner submits that the question presented by this case has not already been answered by *Skinner* and *Von Raab*, *supra*, and thus the instant case presents an important question of federal law which has not been, but should be, settled by this Court.

Finally, the petitioner would ask the Court to take note of Mr. Justice Bradley's admonition in his opinion for the Supreme Court almost a century ago in *Boyd* v. *United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886), which admonition, was repeated by the Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454 (1971) — a case, oddly

enough, cited by the amicus United States Department of Justice in support of its position to the district court below — as follows:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for any stealthy encroachments thereon.

In footnote four of its decision in *Coolidge, supra*, the Court quoted its prior decision in *Gouled* v. *United States*, 255 U.S. 298, 303-304 (1921), as follows:

> It would not be possible to add to the emphasis with which the framers of our Constitution and this court . . . have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments [the Fourth and Fifth]. The effect of the decisions cited is that such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty and private property;" that they are to be regarded as of the very essence of Constitutional liberty; and that the guaranty of them is as important and as imperative

> as are the guaranties of the other fundamental rights of the individual citizen, — the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, imperceptible practice of courts or by well-intentioned, but mistakenly overzealous executive officers.

The Court, in *Coolidge* v. *New Hampshire*, *supra*, then went on to state:

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions." The exceptions are jealously and carefully drawn, and there must be "showing by those who seek exemption . . . that the exigencies of the situation made that course imperative" [T]he burden is on those seeking the exemption to show the need for it. In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own, they won — by legal and constitutional means in England, and by revolution on this continent — a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man's scope to do as

> he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

403 U.S. at 454-455. (Footnotes omitted).

Although the Court in *Coolidge* above was only addressing the burden on those seeking an exemption to the judicial warrant requirement of the Fourth Amendment, the petitioner would submit that such reasoning applies even more forcefully to those not only seeking an exemption to the probable cause requirement as well.

Conclusion.

Because of the obvious public importance of the issue raised by the instant case, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK J. McGEE,*
STEVEN M. GUINEY,
McGEE & PHILLIPS,
1920 Ocean Street,
Marshfield, Massachusetts 02050.
(617) 834-4690

Counsel of Record

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Appendix A.

CLERK'S OFFICE
U. S. COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 88-1228 Gurney v. Ponte, et al.

(Date) June 7, 1989

Mandate herein issued today.

Francis P. Scigliano, Clerk.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1728

ROBERT G. GUINEY, ETC.,
Plaintiff-Appellee,

v.

FRANCIS M. ROACHE, ETC.,
Defendant-Appellant.

ORDER OF COURT

Entered: May 22, 1989

Upon consideration of appellee's motion to stay mandate,
It is ordered that said motion be and the same hereby is denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1728

ROBERT G. GUINEY, ETC.,
Plaintiff-Appellee,

v.

FRANCIS M. ROACHE, ETC.,
Defendant-Appellant.

ORDER OF COURT

Entered: May 17, 1989

The opinion of the Court dated May 11, 1989, in the above-captioned cause is to be published with the correction:

Page 3, lines 6-7 change the sentence beginning "To this extent . . ." to read

To this extent, since we can find no relevant distinction between a customs officer and a police officer, we hold the Police Department's drug testing rule to be constitutional.

By the Court,

/s/ Francis P. Scigliano
Clerk

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1728

ROBERT G. GUINEY, ETC.,
Plaintiff-Appellee,

v.

FRANCIS M. ROACHE, ETC.,
Defendant-Appellant.

JUDGMENT

Entered May 11, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to the district court for further consideration in accordance with the opinion filed, this date.

By the Court:

/s/ Francis P. Scigliano
Clerk.

Appendix E.

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1728

ROBERT G. GUINEY, ETC.,
Plaintiff-Appellee,

v.

FRANCIS M. ROACHE, ETC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before
Bownes, Aldrich, and Breyer,
Circuit Judges.

Kevin S. McDermott with whom *James F. Hart* and *Nancy Wintersteen* were on brief for appellant.

Lowell V. Sturgill, Civil Division, Department of Justice, with whom *John R. Bolton*, Assistant Attorney General, *Frank*

L. McNamara, Jr., United States Attorney, and *Leonard Schaitman*, Civil Division, Department of Justice, were on brief for the United States, Amicus Curiae.

Frank J. McGee, with whom *Steven M. Guiney* and *McGee & Phillips* were on brief for appellee.

Charles R. Dougherty, *Hill & Barlow*, *David Hoffman* and *Emily Lichtenstein* on brief for the Massachusetts Civil Liberties Union Foundation, Amicus Curiae.

May 11, 1989

Per Curiam. On April 24, 1986, the Boston Police Department issued Rule 111. That rule, in its relevant part, requires random drug testing of "all sworn and civilian personnel of the Boston Police Department." The appellee, Robert G. Guiney, president of the Boston Police Patrolmen's Association, and acting as its representative, filed suit against the Police Commissioner asking the district court to declare that the random drug testing program violated the Fourth and Fourteenth Amendments to the Constitution of the United States. The district court so found, and the Police Commissioner has appealed.

Subsequently, the Supreme Court, in *National Treasury Employees* v. *Von Raab*, 57 U.S.L.W. 4338 (U.S. Mar. 21, 1989), held constitutional a drug testing program that the Customs Service applied (without suspecting any individual of any drug use) to customs employees who carry firearms, and to customs officials who help to enforce the drug laws. The Court, however, did not dictate whether the Service could apply its testing program to other employees who handled "classified materials." Instead, the Court remanded the case,

asking the lower court to develop a record that would help determine, and permit the court to weigh the significance of, the reasons for including the latter category of employees in the drug testing program.

The record in our case makes clear that the drug testing before us applies to police officers who carry firearms and to those who participate in drug interdiction. To this extent we hold the Police Department's drug testing rule to be constitutional. The rule also seems to apply to other members of the Department who may not carry firearms or enforce the drug laws. The record is not clear as to just who these latter employees may be or what may be the rationale for including them in the program. Therefore, consistent with the determination of the Supreme Court, we vacate the judgment of the district court and remand for further consideration in such manner as the court sees fit, in light of the recent Supreme Court cases *Skinner* v. *Railway Labor Executives Association*, 57 U.S.L.W. 4324 (U.S. Mar. 21, 1989) and *National Treasury Employees* v. *Von Raab, supra*.

So ordered.

Appendix F.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT E. GUINEY, individually
and as he is President and Representative
of the Boston Police Patrolmen's
Association, Inc.,
Plaintiff,

v.

CIVIL ACTION
No. 86-1346-K

FRANCIS M. ROACHE, as he is
Police Commissioner of the City
of Boston,
Defendant

Final Judgment
May 18, 1988

Section 3(b) of Boston Police Department Rule No. 111, providing for "universal random urinalysis," violates the Fourth and Fourteenth Amendments of the United States Constitution.

/s/ Robert E. Keeton
United States District Judge

Appendix G.

[FOR PUBLICATION]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT E. GUINEY, individually
and as he is President and Representative
of the Boston Police Patrolmen's
Association, Inc.,
Plaintiff,

v.

CIVIL ACTION
No. 86-1346-K

FRANCIS M. ROACHE, as he is
Police Commissioner of the City
of Boston,
Defendant

OPINION
May 18, 1988

KEETON, *District Judge*.

Plaintiff challenges Boston Police Department Rule 111, as amended, which authorizes urinalysis drug testing of department employees on both a reasonable suspicion and a random basis. Plaintiff seeks (1) a declaratory judgment that the Rule's random testing provision violates the Fourth Amendment as incorporated by the Fourteenth Amendment and (2) equitable relief temporarily and permanently enjoining its enforcement. By agreement of the parties, the court bypassed hearings on

plaintiff's prayer for preliminary relief and proceeded directly to non-jury trial of the entire case.

Trial commenced on October 1, 1986, and on that same day the evidence was closed. There followed a motion of plaintiff to reopen the evidence. The court convened a conference on December 15, 1986, at which time a further stipulation was filed and the evidence was closed.

In a reported opinion dated March 6, 1987, the court denied plaintiff's prayer for preliminary relief and dismissed this action on grounds of abstention without prejudice on the merits. *Guiney* v. *Roache*, 654 F. Supp. 1287 (D. Mass. 1987). Plaintiff appealed. The First Circuit held that this court erred in the abstention ruling, *Guiney* v. *Roache*, 833 F.2d 1079 (1st Cir. 1987), and in its mandate dated December 2, 1987, vacated and remanded the cause to this court for "further proceedings."

After consultation with counsel, and with no argument to the contrary having been made, this court determined that the mandate did not require a new trial if all material issues could be resolved in "further proceedings" supplemental to the trial already held. The parties were invited to supplement their previous submissions to reflect any changes in material facts or law since December 15, 1986. The parties chose not to supplement the factual record; however, both plaintiff and defendant submitted further memoranda of law and reply briefs. (Docket Nos. 63, 64, 66, 68). In addition, the Massachusetts Chiefs of Police Association submitted a brief as *amicus curiae*. (Docket No. 69). Oral arguments were then heard on May 13, 1988.

I.

The evidence before the court consists principally of Rule 111 and a stipulation, as twice amended, by which the parties agreed on a statement of the material facts. The entire text of

the rule and of this stipulation is reproduced in the March 6, 1987 Opinion of the court. *See Guiney*, 654 F. Supp. at 1289-94. Those portions of the stipulation most critical to the resolution of the dispute are as follows.

Rule 111 requires Boston police officers to submit to urine testing for illegal drug use both on a reasonable suspicion basis and on a random, without cause, basis. Officers to be tested without cause will be selected by a randomized independent computer program. Those individuals selected will perform their bodily functions in private and unobserved. The specimens collected will be tested twice. The initial test shall use a thin-layer chromatography process. The secondary confirmation test of any positive findings shall use either enzyme immunoassay, gas or liquid chromatography, or mass spectrometry. Final confirmation of the presence of drugs in the urine sample of an officer sets in motion the Civil Service laws of the Commonwealth, under which the officer is entitled to full hearings at which he or she has the opportunity to present a complete legal defense and exculpatory evidence.

II.

By its terms, the Fourth Amendment prohibits only *unreasonable* searches and seizures. In order to determine whether there has been a violation of the Fourth Amendment, a court must proceed in two steps. First, the court must determine that government conduct constitutes a search and seizure by infringing a legitimate expectation of privacy. Second, if a search and seizure occurred, the court must determine whether it was reasonable.

No extended discussion of the first step is required. Urinalysis drug testing is a search and seizure within the meaning of the Fourth Amendment. The federal and state courts that have ruled on the constitutionality of urinalysis drug testing have been virtually unanimous in this conclusion. *See National Fed-*

eration of Federal Employees [NFFE] v. *Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *National Treasury Employees Union* v. *Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988); *McDonnell* v. *Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Feliciano* v. *City of Cleveland*, 661 F. Supp. 578, 584 (N.D. Ohio 1987); *Lovvorn* v. *City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Macias* v. *State*, 649, S.W.2d 150, 152 (Tex. App. 1983). Moreover, this conclusion does not turn on whether or not the procedures employed involve direct visual inspection of urination. *NFFE* v. *Weinberger*, 818 F.2d at 942.

The reasons given for concluding that urinalysis drug testing is a search and seizure are twofold. First, the taking of a urine sample in order to reveal the "personal physiological information" contained therein is a "considerable intrusion upon an individual's reasonable expectation of privacy." *Policemen's Benevolent Ass'n of N.J.* v. *Washington Township*, 672 F. Supp. 779, 787 (D.N.J. 1987); *cf. New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985) (noting that "even a limited search of the person is a substantial invasion of privacy"). Second, the testing of urine is comparable to the testing of blood, which the Supreme Court found to be a search in *Schmerber* v. *California*, 384 U.S. 757 (1966).

III.

Having concluded in Part II that urinalysis drug testing is a search and seizure within the meaning of the Fourth Amendment, I proceed to address the issue of reasonableness. A search is usually considered to be unreasonable, and a violation of the Fourth Amendment, unless a warrant has been procured or probable cause exists in circumstances associated with one of the narrowly drawn exceptions to the warrant requirement. *Cf. O'Connor* v. *Ortega*, 107 S. Ct. 1492, 1501 (1987) (plur-

ality opinion of O'Connor, J.) (noting that "[f]or the most part, we have required that a search be based upon probable cause"). Rule 111 provides for two separate programs of urinalysis, one grounded on a basis of individualized, reasonable suspicion — that is, without a warrant and without probable cause — and the other on a random basis.

I conclude that a rule requiring police officers to submit to urinalysis drug testing on the basis of individualized, reasonable suspicion does not violate the Fourth Amendment. Plaintiff has not seriously challenged this portion of Rule 111, recognizing the trend upholding the constitutionality of urinalysis drug testing of public employees (particularly police officers) based on individualized, reasonable suspicion. *See Railway Labor Executives' Assoc.* v. *Burnley*, 839 F.2d 575, 589 (9th Cir. 1988); *Feliciano*, 661 F. Supp. at 587-90; *Lovvorn*, 647 F. Supp. at 882-83; *Capua* v. *City of Plainfield*, 643 F. Supp. 1507, 1516 (D.N.J. 1986). A warrantless search under these circumstances is well supported in analogous precedents. In *T.L.O.*, the Court reasoned that no warrant is needed if " 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.' " *T.L.O.*, 469 U.S. at 340 (citing *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967)). Where the purpose of the search is to detect illegal substances in the body, it is undisputed that the delay of obtaining a warrant could frustrate that purpose. *See Washington Township*, 672 F. Supp. at 785; *cf. Schmerber*, 384 U.S. at 770-771.

As to the more difficult issue of the reasonableness of a search on a less-than-probable-cause basis, two reasons have been forwarded in support of the individualized, reasonable suspicion standard. First, in a plurality opinion addressing the appropriate standard for a search conducted by a public employer in order to investigate work-related employee misfeasance, the Supreme Court determined that probable cause is not

required. *O'Connor*, 107 S. Ct. at 1501. Second, the state's legitimate interest in the efficient and safe operation of police work is strongly implicated where there is reasonable suspicion that a police officer is performing his or her duties under the influence of drugs. This strong interest outweighs the officer's reasonable expectation of privacy. *Cf. Burnley*, 839 F.2d at 589 (stating that, "[a]lthough body fluid testing is highly intrusive, if it were occasioned only by individual suspicion, the intrusion would not be excessive in light of the nature of the suspected rule violation").

IV.

The focus of plaintiff's challenge to Rule 111 is on the reasonableness of *random* drug testing. This challenge presents a very serious issue.

"[T]he requirement that the government treat individuals as individuals and not as faceless and fungible members of a class lies at the very core . . . of the Fourth Amendment . . . ." *Duarte* v. *Healey*, Memorandum and Order on Motions for Summary Judgment and Dissolution of a Preliminary Injunction, C.A. No. 85-4429, slip op. at 19 (Ma. Super. Ct. May 20, 1987). Some members of individualized suspicion is generally a prerequisite to a constitutional search and seizure, even in areas where the government has a great need. *See National Federation of Federal Employees [NFFE]* v. *Carlucci*, C.A. No. 87-1797, slip op. at 33 (D.D.C. Mar. 1, 1988); Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 Nova L.R. 307, 341 (1987). Although the Supreme Court has not made individualized suspicion an absolute prerequisite to a valid search, exceptions to the requirement of individualized suspicion have been upheld only where the privacy interests implicated by the search were minimal and where safeguards guaran-

teed that the individual's reasonable expectation of privacy was not subject to the discretion of government officials. *See T.L.O.*, 469 U.S. at 342 n.8. At the least, the Fourth Amendment requires a "heavy presumption" against searches not based on reasonable suspicion, which presumption can be overcome only by a compelling government interest. *NFFE* v. *Carlucci*, slip op. at 34.

Recognizing this presumption, most courts that have addressed the issue have held that random drug searches violate the Fourth Amendment. *See Washington Township*, 672 F. Supp. at 794 (noting the "trend within the judiciary" to require individualized, reasonable suspicion before a public employee may be drug tested); Bookspan, *Behind Open Doors*, 11 Nova L.R. at 341 (concluding that "most recent judicial opinions disfavor random employee drug screening"). Indeed, every reported decision located by the court regarding the constitutionality of random or mass drug testing *of police officers* has determined that the practice violates the Fourth Amendment. *See Washington Township*, 672 F. Supp. 779 (D.N.J. 1987); *Feliciano*, 661 F. Supp. 578 (N.D. Ohio 1987); *Bostic* v. *McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986); *Penny* v. *Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986); *Capua*, 643 F. Supp. 1507 (D.N.J. 1986); *Caruso* v. *Ward*, 133 Misc.2d 544, 506 N.Y.S.2d 789 (N.Y. Sup. Ct. 1986); *Palm Bay* v. *Bauman*, 475 So.2d 1322 (Fla. App. 1985). I conclude, consistently with the cases cited above, that Rule 111 is unconstitutional to the extent that it authorizes random urinalysis of Boston police officers.

To determine the reasonableness of random drug testing a court must weigh "the need to conduct a random drug search against the resulting invasion of the police officers' expectation of privacy." *Washington Township*, 672 F. Supp. at 786.

Urinalysis drug testing strongly infringes upon a police officer's legitimate expectation of privacy. "As measured by the

expectation of privacy, inspections of personal effects are generally least intrusive, while breaches of the 'integrity of the body' result in the greatest invasion of privacy." *Capua*, 643 F. Supp. at 1514. Simply put, drug testing is very intrusive. It requires that one's bodily fluids be turned over to the government for analysis, even though they contain information concerning not only one's use of drugs but also such other matters as whether one is pregnant or suffers from any of a large assortment of diseases detectable by such testing. *See* Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L.R. 605, 635 (1987). As the court put it in *Capua*, "[d]rug testing is a form of surveillance, albeit a technological one." *Capua*, 643 F. Supp. at 1511.

In his brief and in Rule 111 itself, defendant has identified two primary interests argued to outweigh the harm from the serious invasion of the police officers' expectation of privacy. They are: the government's interest in (1) the integrity of the police force and (2) a safe and efficient police department.

Defendant argues that the city's interest in the "integrity" of the police force is a compelling one because there is a strong need to detect and prevent even the off-duty use of drugs by police officers. The need arises, it is argued, because an officer who uses drugs may be susceptible to bribery or to a temptation to divert seized drugs. In addition, it is argued that even the possibility of drug use by police officers undermines public confidence in the police force, which in turn undermines the ability of the force to perform its job.

The shortcoming of the integrity argument is that, without factual support, it proves too much. The exact same argument could be made as to any breach of law or the public trust. For example, *if* many police officers received stolen property off duty, this fact would make them susceptible to bribery, tempt them to divert seized property, and undermine the confidence of the public in the police force. Nevertheless, it has never

been suggested that random searches of the homes of police officers would survive constitutional scrutiny. Before a court can even begin an informed weighing of the government's "integrity" interest in conducting a search against the infringement of the privacy interests contemplated by urinalysis, the court must be able to make a determination that the factual predicate for the parade of horrors exists. I cannot make that determination on the record before me, either as an adjudicative fact finding or as a nonadjudicative fact determination.

The burden on defendant to establish the factual predicate for its argument might be satisfied either (1) by evidence that circumstances distinctive to the Boston police department make drug abuse a significant problem, or (2) by a showing that drug abuse is a problem in police departments generally throughout the Commonwealth of Massachusetts or throughout the United States because of facts common to such departments. *Cf. Feliciano*, 661 F. Supp. at 587-588. As I noted in my Opinion of March 6, 1987, a showing of the first type, seeking an adjudicative fact finding by this court, has not been seriously attempted in this case. *Guiney*, 654 F. Supp. at 1300. No evidence proffered at trial or during the recent opportunity to supplement the factual record supports and adjudicative fact finding of such a drug abuse problem in the Boston police department.

Defendant's effort to establish a factual basis for its integrity argument rests on the last showing described above — that a drug abuse problem exists in police departments throughout the United States. Rule 111 itself cites the "national epidemic in the illicit use of drugs." Such a determination by this court would stand as a precedent and not merely as a fact finding applicable only to the case at hand. *See id.* at 1301. A nonadjudicative determination that a national drug abuse problem exists (though not as applied to police departments) has been made, at least implicitly, by several other courts. *See id.* (and

cases cited therein). Even if (based on the implicit determinations in several reported opinions) I assume the existence of a national drug problem, however, I am unable to determine that drug abuse is a widespread problem *in police departments* throughout the United States (or that the Police Commissioner's nonadjudicative determination of the existence of such a problem is supportable).

The integrity of the Boston police department is called into question only to the extent that police officers are suspected of abusing drugs. A determination that many members of society at large abuse drugs would compel a like conclusion as to police officers only if society and police officers are alike with respect to whether, though as a whole composed largely of law abiding persons, each group includes a percentage of drug offenders sufficient to be material to the constitutional issues presented by random drug testing. The evidence is to the contrary. Despite the intensive media attention devoted to drug abuse, defendant has proffered no evidence that *any* police department in the nation suffers from a drug abuse problem. The fact that all cases addressing the issue of random drug testing of police officers have determined the practice to be unconstitutional, *see supra* [p. 15a], suggests that neither precedent nor any other basis exists for the court to make a nonadjudicative determination sufficient to sustain defendant's contention. Similarly, and more precisely in point, there is no basis for the court to make a determination that the Police Commissioner's nonadjudicative determination is supportable. At minimum, in order for Rule 111 to be upheld as constitutional the Police Commissioner must have a rational basis for determining that police departments generally include, or the Boston Police Department in particular includes, a percentage of drug offenders sufficient to be material to the constitutional issues presented. As previously stated, *no* basis has been shown to support either of these determinations by the Commissioner.

There is no denying that the government has a compelling interest in preventing police officers from working under the influence of drugs. Because of the nature of police work, this interest exceeds even the generally recognized interest of any employer in an efficient work force. The weight of this argument in the present context, however, is reduced by two considerations.

First, the fit between random urinalysis and the goal of work safety and efficiency is tenuous. Urinalysis drug testing is not capable of showing whether an individual is impaired by drugs or under the influence of drugs. *Burnley*, 839 F.2d at 588-89; *NFFE* v. *Carlucci*, slip op. at 27-28; Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L.R. 605, 632 (1987). Indeed, in the context of arguing for the "deterrent" value of random urinalysis, the defendant states that "random testing is effective . . . because its aim is to detect chronic abusers rather than actual impairment." Brief of Defendant (Docket No. 64) at 5. The reason urinalysis is incapable of measuring impairment is that, for the most commonly abused drugs (cocaine and marijuana), urinalysis detects the presence not of the drug but of a drug metabolite — an inactive product resulting from the body's breakdown of a drug. Metabolites may appear in urine for several days, even weeks, after exposure to the drug. *Cf. NFFE* v. *Carlucci*, slip op. at 29.

Second, the government's interest in preventing police officers from working under the influence of drugs is well served by allowing testing on a reasonable suspicion basis, which is "already a significant concession of deference to the state's legitimate interests." *Capua*, 643 F. Supp. at 1518. Government employees such as police officers are under constant observation by superiors and co-workers, and one working under the influence of drugs would show signs upon which a

case on reasonable suspicion could be built. Thus, the state's interest in safety and efficiency on the job "will not be significantly impaired by [requiring satisfaction of] the individualized reasonable suspicion standard." *Id.*; *see also Washington Township*, 672 F. Supp. at 790. The additional protection (against an officer's being impaired while on duty) to be gained by random tests is marginal.

The court's conclusion as to the marginal effectiveness of random drug testing where drug testing is already conducted on a reasonable suspicion basis could be rebutted, perhaps, by a showing sufficient for the court to make an adjudicative finding that reasonable suspicion testing *has not* been effective in preventing police officers of a particular police force from working under the influence of drugs. *Cf. Transport Workers' Union of Philadelphia* v. *Southeastern Pennsylvania Transp. Authority*, 678 F. Supp. 543 (E.D. Pa. 1988) (upholding random drug tests of certain transportation authority employees upon an adjudicative finding of "compelling evidence of a current drug and alcohol problem unlikely to be solved by less aggressive measures"). Defendant has not seriously attempted to make such a showing. As I noted above, at page [17a], defendant has not attempted to show that there is any on- or off-duty drug abuse problem in the Boston police department.

V.

As the court noted in *NFFE* v. *Carlucci*, it is not easy to line up and explain on a single coherent theory all of the many cases decided by federal and state courts on the difficult subject of random drug testing. *NFFE* v. *Carlucci*, slip op. at 44. It would not be profitable even to attempt that feat here. Nevertheless, because the subject is such an important one, two of the major arguments advanced in support of random drug testing are addressed in this Part.

The first major argument is suggested by *Shoemaker* v. *Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), which upheld New Jersey Racing Commission Regulations authorizing random drug tests of jockeys (and others) in the horse-racing industry. The *Shoemaker* court determined that the horse-racing industry in New Jersey was a highly-regulated one within the meaning of the administrative-search exception to the warrant requirement (and to an individualized suspicion requirement) and proceeded to decide that the administrative-search exception may extend to the warrantless testing of *persons* engaged in regulated activity. *Id.* at 1142. Finally, the *Shoemaker* court determined that the two requirements justifying the warrantless administrative-search exception had been met — New Jersey has a "strong state interest in conducting an unannounced search" and the pervasive regulation of the horse-racing industry "reduced the justifiable privacy expectation of the subject of the search." *Id.* at 1142. (More recently, the Eighth Circuit upheld random drug testing of nuclear power plant employees as within the administrative-search exception articulated in *Shoemaker*. *See Rushton* v. *Nebraska Public Power District*, 1988 U.S. App. Lexis 4825 (8th Cir. Apr. 14, 1988).)

There are three reasons why I conclude that the random drug testing of Boston police officers does not fall within the administrative-search exception. First, unlike jockeys in the New Jersey horse-racing industry (or employees in the nuclear-power industry), police officers in Massachusetts do not work in a highly-regulated industry within the meaning of the administrative-search exception. Indeed, the police force "industry" is not regulated at all, perhaps because it does not pose a danger to the community like that of mining, *cf. Donovan* v. *Dewey*, 452 U.S. 594 (1981), or of the sale of firearms and ammunition, *cf. United States* v. *Biswell*, 406 U.S. 311 (1972). The only regulations imposed upon Boston police officers are

those stemming directly from their status as employees of the city. If this type of regulation were sufficient to trigger the administrative-search exception, then *every* government employee would find his or her expectations of privacy diminished to the same degree as the owner of a gun shop or the operator of a coal mine. *Cf.* Kamisar, *The Fourth Amendment in an Age of Drug and Aids Testing*, 32 Law Quadrangle Notes 40, 43 (Fall 1987) (noting that " '[a]dministrative search' is swarming around the Fourth Amendment like bees. And the drone may soon become deafening."). The Supreme Court precedents do not support such a sweeping proposition. For these reasons, courts have explicity stated that police officers do not work in a highly-regulated industry. *See Washington Township*, 672 F. Supp. at 786-787; *Fraternal Order of Police* v. *Newark*, 216 N.J. Super. 461, 524 A.2d 430, 434-435 (1987).

Second, absent Supreme Court or First Circuit authority, I would not conclude that the administrative-search exception applies to searches of *employees* in highly-regulated industries. In both *Donovan* v. *Biswell*, the Supreme Court stressed the diminished threat to privacy involved in "inspections of commercial property." *Donovan*, 452 U.S. at 598-99; *Biswell*, 406 U.S. at 317. In contrast, the intrusion of an individual's expectation of privacy is very great in the context of urinalysis drug testing. *See supra* pp. [15a-16a].

Third, I find that the first requirement justifying the administrative-search exception — the requirement of a "strong state interest in conducting an unannounced [and random] search" — is not met in the present case. For the reasons stated above at pages [19a-20a], the defendant has failed to establish that legitimate state interests are furthered to a significantly greater extent by random searches where searches based on reasonable suspicion have been authorized.

The second major argument I address is defendant's argument that police officers in Massachusetts have a significantly

diminished expectation of privacy, and, as a result, Rule 111 is reasonable despite the absence of a compelling state justification. Although language in some opinions of the First Circuit and of Massachusetts' courts may appear on first reading to support defendant's argument, closer scrutiny of the precedents leads me to conclude that they do not support the position that Massachusetts police officers enjoy a lesser expectation of privacy within the meaning of the Fourth Amendment.

Defendant relies primarily on *O'Brien* v. *DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977), and *Broderick* v. *Police Comm'r of Boston*, 368 Mass. 33, 330 N.E.2d 199 (1975), *cert. denied*, 423 U.S. 1048 (1976). In *O'Brien*, the First Circuit found that plaintiff-appellants (police officers) failed to state a claim for violation of their constitutional rights where the Commissioner had ordered them to complete a detailed financial questionnaire. Plaintiffs attacked the questionnaire primarily as an invasion of privacy, not as a violation of their Fourth Amendment rights. *O'Brien*, 544 F.2d at 545. In addressing the Fourth Amendment issue, the court stated only that "even if the Fourth Amendment applies to this sort of intrusion, the Commissioner's order is not so lacking in justification as to be an 'unreasonable' invasion of the patrolmen's 'legitimate expectation of privacy.'" *Id.* at 546. Thus, the *O'Brien* court did not decide that the Fourth Amendment even applied to the issues presented. Moreover, the court did not determine that police officers had a lower expectation of privacy than other individuals; rather, it determined only that the intrusion was not unreasonable in the circumstances presented.

Broderick also concerned questionnaires directed to Boston police officers. As in *O'Brien*, the primary issue presented was not one under the Fourth Amendment. Indeed, the *Broderick* court never even refers to the Fourth Amendment in its opinion.

The cases cited by defendant fail to support the proposition that Boston police officers have a substantially lower expectation of privacy than other individuals in relation to random urine testing. Both cases involve questionnaires in circumstances where it is clear that neither court believed a search and seizure was present. *Cf. supra* at pages [11a-12a]. *O'Brien* and *Broderick* establish only that the city has a legitimate interest in the integrity of its police force, which interest is rationally served by inquiry into certain aspects of an officer's off-duty conduct. They do not speak to the balancing required under the Fourth Amendment.

VI.

For the foregoing reasons, I conclude that the invasion of the police officers' expectations of privacy resulting from the enforcement of the random testing provision in Rule 111 outweighs the city's need to conduct random drug searches; therefore, the method of testing provided for in section 3(b) of Rule 111, on its face, authorizes an unreasonable search and seizure and violates the Fourth Amendment.

In addition to the declaratory relief to which I have determined plaintiff is entitled, plaintiff has requested permanent injunctive relief. I conclude, however, that on the record before me there is no basis for finding any likelihood that the defendant, as a responsible public official, would attempt to proceed with enforcement of section 3(b) of Rule 111 while a court judgment remains in effect, determining that provision to be in violation of the Fourth Amendment. In these circumstances, I cannot find a likelihood that plaintiff will suffer irreparable harm in the absence of an injunction. For this reason, the final judgment entered at this time will not include injunctive relief. Of course, plaintiff will be free to move that the case be

reopened for further proceedings upon a showing that a need has arisen for additional relief.

/s/ Robert E. Keeton
United States District Judge

Appendix H.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 87-1219

ROBERT T. GUINEY, ETC.,
Plaintiff-Appellant,

v.

FRANCIS M. ROACHE, ETC.,
Defendant-Appellee.

JUDGMENT

Entered: December 2, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to the district court for further proceedings.

Cost to appellant.

Appendix I.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1219

ROBERT T. GUINEY, ETC.,
Plaintiff-Appellant,

v.

FRANCIS M. ROACHE, ETC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before
Coffin, Aldrich and Torruella,
Circuit Judges.

Frank J. McGee with whom *Steven M. Guiney* and *McGee & Phillips* were on brief for appellant.

Marjorie Heins, Massachusetts Civil Liberties Union Foundation, and *James Newman* on brief for the Civil Liberties Union of Massachusetts, Amicus Curiae.

Robert Carty with whom *Kevin S. McDermott* and *James F. Hart*, Office of the Legal Advisor, Boston Police Department, were on brief for appellee.

December 2, 1987

COFFIN, *Circuit Judge*. Plaintiff brought an action challenging, on federal constitutional grounds, Boston Police Department Rule 111, which authorizes urinalysis drug testing of Department employees. After a trial on the merits, the district court decided *sua sponte* to abstain from the exercise of federal jurisdiction, on the authority of *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941). *See Guiney* v. *Roache*, 654 F. Supp. 1287 (D. Mass. 1987). Plaintiff now appeals the district court's order dismissing the case. We conclude that abstention was improper and vacate the district court's order.

I.

In April of 1986, the defendant, Police Commissioner of the City of Boston, issued Rule 111, which authorized urinalysis drug testing of Department employees on both a reasonable-suspicion and a random basis. A positive test result would lead to the employee's being charged with unauthorized use of illegal drugs and conduct unbecoming an employee. If the Department could prove the violations were knowing, the employee would be subject to discipline, including discharge. *See Guiney*, 654 F. Supp. at 1289-94 (quoting Rule 111 in full). Refusal to take the test, the parties stipulate, could also lead to discharge or other discipline.

Plaintiff is president and a member of the Boston Patrolmen's Association, Inc., a labor organization consisting of some 1500

Boston police patrolmen. He brought an action for declaratory and injunctive relief in the district court, claiming that Rule 111 permitted unreasonable searches and seizures in violation of the fourth and fourteenth amendments to the federal constitution. Defendant agreed not to enforce Rule 111 pending the district court's ruling.

After a trial on the merits, the district court decided, *sua sponte*, to abstain on *Pullman* grounds. The court reasoned, first, that the Massachusetts courts might be able to resolve the case on state constitutional grounds and, second, that the Massachusetts courts were better suited to resolve certain factual issues in the case. We consider each of these points in turn and then conclude by addressing additional arguments advanced by defendant in favor of dismissal.

II.

We start with the proposition that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976). " 'Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.' " *Id.* (quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959)). The *Pullman* variety of abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent, but unsettled, state law. Where state law is unsettled, a federal court's resolution of the state law question will inevitably be "a forecast rather than a determination," *Pullman*, 312 U.S. at 499, "a tentative answer which may be displaced tomorrow by a state adjudication." *Id.* at 500. Because the state adjudication might alter or moot the federal constitutional

question, *Pullman* abstention serves a dual purpose: it "avoid[s] the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Id.*

Sometimes *Pullman* abstention is appropriate because the federal claim is "entangled in a skein of state law that *must* be untangled before the federal case can proceed." *McNeese* v. *Board of Education*, 373 U.S. 668, 674 (1963) (emphasis added). But that is not the case here; plaintiff's complaint does not attack Rule 111's validity under any provision of state law, and there is no real dispute over the meaning of Rule 111.[1] Because there is no need to forecast state law, there is no risk of the friction that might be occasioned by such a forecast and no risk that the district court's decision might "be displaced tomorrow by a state adjudication." *Pullman*, 312 U.S. at 500.

The district court's decision to abstain relied not upon any ambiguity in Rule 111 itself, but upon a variant of the *Pullman* doctrine holding that abstention may be appropriate when "the uncertain status of local law stems from the unsettled relationship between the state constitution and a statute." *Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77 (1975). Here, the district court reasoned that Rule 111 might be held violative of the Massachusetts Constitution's Declaration of Rights, Article 14, which declares in relevant part that "[e]very subject has the right to be secure from all unreasonable searches, and seizures, of his person . . . ." The Massachusetts Supreme Judicial Court has held that Article 14 "provides more substantive

[1] Although the district court was concerned that some ambiguity remained as to the consequences under Rule 111 of a positive test result, *Guiney*, 654 F. Supp. at 1297-98, it did not base its decision to abstain on this ambiguity, *id.* at 1298, and our own review of the record persuades us that Rule 111 is not ambiguous in this regard. More important, any such ambiguity that might exist would not in any way change plaintiff's federal constitutional claim, which attacks the testing process itself rather than the disciplinary process that a positive test result might trigger.

protection to criminal defendants than does the Fourth Amendment in the determination of probable cause." *Commonwealth* v. *Upton*, 394 Mass. 363, 373, 476 N.E.2d 548, 556 (1985). On this basis the district court found "a real possibility that Rule 111 could be held to violate Article 14 regardless of whether or not it violates the Fourth and Fourteenth Amendments." *Guiney*, 654 F. Supp. at 1299. The district court thus abstained, giving the Massachusetts courts an opportunity to consider the state constitutional question and thereby possibly to alter or moot the federal constitutional question.

We think the district court construed too broadly the circumstances in which abstention is appropriate for the purpose of obtaining an authoritative interpretation of a state constitutional provision. In *Harris County*, 420 U.S. 77, the issue was a unique Texas constitutional provision granting job security to constables and justices of the peace. Similarly, in *Reetz* v. *Bozanich*, 397 U.S. 82 (1970), the Court ordered abstention in order to obtain a construction of unique Alaska state constitutional provisions protecting fishing rights. And in *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959) (per curiam), abstention was appropriate because the case involved a unique Mississippi constitutional provision providing that utilities, through their own conduct, could forfeit state-granted contract rights. *See Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 154 F. Supp. 736, 737-738 (S.D. Miss. 1957) (discussing Section 179 of the Mississippi constitution), *aff'd*, 256 F.2d 83 (5th Cir. 1958), *vacated and remanded*, 358 U.S. 639 (1959 (per curiam).

Under *Harris County*, *Reetz*, and *City of Meridian*, it is not the uniqueness *per se* of a state constitutional provision that makes abstention appropriate. These cases merely demonstrate that state constitutional provisions that are unique are, for that very reason, less likely to have been authoritatively construed by the state's highest court and less likely to be familiar to

federal courts than are state constitutional provisions that are directly parallel to federal constitutional guarantees. In other words, where the state constitutional provision bearing on a case is unique, there is more likely to be an "unsettled relationship between the state constitution and a statute." *Harris County*, 420 U.S. at 84. Still, it is only "where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, *and* where the scheme as a whole calls for clarifying interpretation by the state courts" that abstention is appropriate. *Harris County*, 420 U.S. at 85 n.8 (emphasis added). If, despite the provision's uniqueness, no such clarifying interpretation is necessary, then there is no reason to abstain; the federal court may simply proceed to apply state law, if this will alter or moot the federal constitution claim.

This doctrine of abstention has its corollary in the rule that "abstention is *not* required for interpretation of *parallel* state constitutional provisions." *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 237 n.4 (1984) (citing cases) (emphasis added). This rule simply recognizes that where state and federal constitutional provisions are parallel, the state provision is unlikely to be any more ambiguous than the federal provision, and abstention is unnecessary.[2] Thus the Court has "declined to order abstention where the federal [constitutional] claim was not complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar

[2] Even if there is substantial question as to how parallel state and federal provisions affect a given case, the fact that they are parallel suggests that there is little to be gained by a federal court's abstaining simply to permit resolution of the case on state constitutional rather than federal constitutional grounds. This is because parallelism, in practice, means that state courts will look to federal precedent in interpreting parallel state constitutional provisions; abstention would thus mean only that the result would hang on a state rather than a federal peg. We question whether the policies of avoiding unnecessary federal constitutional decisions and state-federal friction would really be served by resorting to such a time-consuming sleight-of-hand.

provision of the state constitution." *Harris County*, 420 U.S. at 84 n.8 (explaining *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971)). A contrary result "would convert abstention from an exception into a general rule." *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572, 598 (1976) (footnote omitted). It would require in most cases that state remedies be exhausted before a federal court could act to vindicate federal constitutional rights — a requirement that the Court has consistently rejected. *See Steffel* v. *Thompson*, 415 U.S. 452, 472-73 (1974); *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961).

In the instant case, the relevant provision of Article 14, the state constitutional provision that led the district court to abstain, is almost exactly parallel to the fourth amendment, on which plaintiff predicated his claim.[3] We are unaware of any case in which these two provisions have been interpreted differently. True, the Supreme Judicial Court has held that Article 14 "provides more substantive protection to criminal defendants than does the Fourth Amendment *in the determination of probable cause*." *Commonwealth* v. *Upton*, 394 Mass. 363, 373, 476 N.E.2d 548, 556 (1985) (emphasis added). But *Upton* itself applied only to determinations of probable cause for the issuance of a search warrant; it did not signal that Article 14 jurisprudence would thenceforth diverge in all respects from fourth amendment jurisprudence. In particular, nothing in *Upton* indicated that warrantless searches and seizures, such as those permitted by Rule 111, would be judged against an Article 14 standard of reasonableness that is any higher than the prevailing fourth amendment standard.

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[3] Article 14 declares in relevant part that "[e]very subject has the right to be secure from all unreasonable searches, and seizures, of his person . . . ." The fourth amendment declares in relevant part that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."

We note, moreover, that in a post-*Upton* decision involving claims under both Article 14 and the fourth amendment, the Supreme Judicial Court has held that "[a]lthough the Massachusetts Declaration of Rights may afford greater protection to an individual than the protection afforded by the United States Constitution, . . . the same factors are material to a consideration of the constitutionality under either document of a roadblock stop of motor vehicles for the purpose of detecting drunk drivers." *Commonwealth* v. *Trumble*, 396 Mass. 81, 86, 483 N.E.2d 1102, 1105 (1985) (quoting *Commonwealth* v. *McGeoghegan*, 389 Mass. 137, 141 n.2, 449 N.E.2d 349, 352 n.2 (1983) (citations omitted). The *Trumble* court went on to analyze the challenged roadblocks using a mixture of state and federal precedent.

We find *Trumble* particularly significant because the Article 14 and fourth amendment questions raised in that case are similar to the fourth amendment questions at issue in the instant case. Broadly speaking, both cases involve balancing the individual's right to be free of arbitrary searches and seizures against the public interest in detecting substance abuse in situations where such abuse could be particularly dangerous to the rights — indeed, the lives — of others. *Trumble* thus indicates that the Massachusetts courts would likely approach an Article 14 challenge to Rule 111 in much the same way that a federal court would approach a challenge to Rule 111 under the fourth amendment. And where federal and state approaches are harmonious, there is little risk of "needless friction with state policies," *Pullman*, 312 U.S. at 500; thus the necessary predicate for *Pullman* abstention is wanting.

Even if we could not look to *Trumble* for reassurance that Article 14 and the fourth amendment operate in parallel fashion as to plaintiff's challenge to Rule 111, we would still conclude that the two provisions are sufficiently parallel so as to render abstention inappropriate. Where the constitutional provisions

at issue are facially parallel, as here, we do not think abstention justified by the mere *possibility* of divergence from parallelism, or by the fact that the provisions have diverged in another context, as exemplified here by *Upton*.[4] We think the logic of *Pullman* requires some more specific indication that state law is genuinely unsettled before a federal court should stay its hand. A plaintiff's choice to pursue a federal remedy in a federal forum should not be lightly overturned.

III.

The district court offered a second reason for abstention. In the court's view, Rule 111 could survive a federal constitutional challenge only if defendant could show a compelling need outweighing the fourth and fourteenth amendment interests at stake. The court noted that

> [t]his burden might arguably be satisfied either (1) by evidence offered in the case sub judice that supports a fact finding that such a compelling need exists because of circumstances distinctive to the Commonwealth of Massachusetts or the Boston Police Department, or (2) by a showing that such a compelling need exists in police departments generally throughout the United States because of facts common to such departments generally.

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[4] The Supreme Court has frequently stressed that abstention is not justified by the mere possibility that a state court *might* interpret a state statute so as to alter or moot a federal constitutional question; abstention is only appropriate where state law is genuinely unsettled. *E.g., Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 237 (1984). We think the same rule applies where the assertedly "uncertain status of local law stems from the unsettled relationship between the state constitution and a statute." *Harris County*, 420 U.S. at 84. Only where divergence is likely, yet the nature or extent of the divergence unclear, would abstention be warranted. *Cf. McRedmond* v. *Wilson*, 533 F.2d 757, 760-64 (2d Cir. 1976).

Guiney, 654 F. Supp. at 1300. The court thus determined that in order to resolve the federal constitutional claim it might have to assess whether a compelling need existed at the national level that could justify Rule 111. The court termed this assessment a "non-adjudicative factfinding" which would have precedential value in other cases. *Id.* at 1300-01. The court felt that such a precedent-setting non-adjudicative factfinding incident to resolving federal constitutional claims should be avoided if the case could be resolved by the Massachusetts courts on state constitutional grounds. *Id.* at 1302. Moreover, resolving the case on state rather than federal grounds might involve an assessment of statewide rather than nationwide conditions and interests. The court felt that this circumstance weighed in favor of abstention because the Massachusetts courts would be better attuned to the nature and extent of the drug problem at the state level and would be less likely to be distracted by nationwide considerations. *Id.*

The question whether Rule 111 should be judged against conditions at the national, state, or local levels has not been briefed on this appeal, and we express no opinion upon it. Assuming without deciding that the district court was correct in framing the constitutional inquiry in terms of compelling need, we conclude that whatever the proper assessments involved in that inquiry, the district court should have undertaken them.

Assuming *arguendo* that the proper focus is on national conditions, we are not persuaded that "to address nationwide non-adjudicative fact issues incident to adjudication of the Fourth and Fourteenth Amendment claims," *id.*, "is to do anything other than adjudicate those same claims. This is because the type of finding about which the district court was concerned was not a purely factual finding that a drug problem of a given magnitude exists at the national level, but instead a "non-adjudicative fact finding of compelling need that out-

weighs intrusions on privacy . . . ." *Id.* at 1301. We have difficulty distinguishing such a "finding," which clearly involves legal as well as factual assessments, from an actual resolution of the federal constitutional claims. Thus the possibility of resolving this case on state constitutional grounds no more justified avoidance of nationwide non-adjudicative factfindings than it justified abstention on the federal constitutional claims themselves.

Alternatively, assuming that the proper focus in adjudicating the federal claims is on the particular nature and extent of the drug problem at the state or local levels, we do not share the court's concerns about its potential insensitivity to conditions at those levels. We are unaware of any case in which a state court's assertedly greater sensitivity to state or local conditions has been held to justify federal abstention. Moreover, federal courts are frequently called upon to weigh the strength of state interests, and the care with which the state has crafted the means to vindicate those interests, against the resulting burdens on individual rights. We do not think it can fairly be said that in so doing they have consistently either undervalued or overvalued the state interests at issue. The efforts of the district court in this case to identify possible sources of state-federal friction demonstrate an acute sensitivity to the federalism concerns underlying *Pullman*. We are confident that this same sensitivity will enable the court, on remand, to focus on assessing the relevant conditions without being distracted by what the court determines to be extraneous considerations and overbroad assumptions.

IV.

Defendant offers two additional reasons, not relied upon by the district court, in support of dismissal; we dispose of these summarily. First, defendant suggests that abstention is appro-

priate based upon the principles first announced in *Younger* v. *Harris*, 401 U.S. 37 (1971) (holding that federal courts should abstain from enjoining state criminal proceedings, absent bad faith, harassment, or a patently invalid state statute). But plaintiff here does not seek to enjoin any proceeding — pending or threatened, criminal or civil. Rather, plaintiff seeks to enjoin defendant from forcing police officers to give urine samples without probable cause. Thus *Younger* and its progeny have no application here.

Second, defendant suggests that dismissal is appropriate because an action raising similar issues is currently pending in state court. We assume defendant's argument is based on *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817-819 (1976), which held that where simultaneous federal and state proceedings concerning the same matter are pending, dismissal of the federal case might be appropriate in exceptional circumstances. We find *Colorado River* inapplicable because the pending state proceeding apparently does not concern the "same matter"; it concerns drug testing of police recruits, but does not concern Rule 111, which is at issue here.

Vacated and remanded.

Appendix J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT T. GUINEY, individually
and as he is President and Representative
of the Boston Police Patrolmen's
Association, Inc.,
Plaintiff,

v.

CIVIL ACTION
No. 86-1346-K

FRANCIS M. ROACHE, as he is
Police Commissioner of the City
of Boston,
Defendant

Memorandum and Order
April 9, 1987

In an Opinion and Final Judgment dated March 6, 1987, this court abstained from deciding plaintiff's federal constitutional claims so that the state courts could resolve unclear issues of state law that might avoid or modify the constitutional issues argued by the parties. Pursuant to the procedure explained in *Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, 601 F.2d 39 (1st Cir. 1979), *cert. denied*, 450 U.S. 912 (1981), at a conference held March 20, 1987, I allowed the parties an opportunity to request reconsideration of any issues decided in the Opinion. Plaintiff then moved for relief from judgment under Fed. R. Civ. P. 60(b), and has filed a supporting memo-

randum of law. Defendant has also filed a memorandum in support of reconsideration, which will be treated as a Rule 60(b) motion as well.

Having reviewed the parties' memoranda, I conclude for reasons stated below that the Final Judgment should stand as originally entered.

I.

Plaintiff argues that abstention was not appropriate because there is no uncertain question of state law in this case. Plaintiff contends that because the Boston Police Department Rule at issue is itself unambiguous, it cannot present an unclear question of state law. Plaintiff relies on *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), in which the Supreme Court held that *Pullman* abstention is not required to allow state courts the opportunity to interpret a statute that is not of an uncertain nature" and is not "obviously susceptible of a limiting construction." *Id.* at 237.

Plaintiff's argument fails to recognize that an unclear question of state law can exist not only when a challenged enactment contains an ambiguity which leaves it susceptible to a limiting construction, but also when an unambiguous enactment is subject to challenge as being inconsistent with or otherwise invalid under state law. Thus, the lack of ambiguity in Rule 111 does not necessarily make abstention improper.

In this case abstention was not ordered merely to secure a possible limiting construction of Rule 111 itself, but to allow the state courts to evaluate Rule 111's validity under Article 14 of the Declaration of Rights, and possibly under the state civil service laws as well. Plaintiff's arguments concerning the clarity of the rule are therefore unpersuasive.

II.

Plaintiff argues that abstaining to allow evaluation of Rule 111 under Article 14 is "equally faulty" because Article 14 is a parallel provision to the Fourth Amendment. Plaintiff relies in part on *Commonwealth* v. *Wilkins*, 243 Mass. 356, 138 N.E. 11 (1923), in which the Massachusetts Supreme Judicial Court stated that the Fourth Amendment is "in substance the same as" Article 14. Reliance on this 1923 case is wholly unpersuasive, however, in light of the Supreme Judicial Court's recent interpretation of Article 14 as providing greater substantive protection to individual rights than the Fourth Amendment, at least with respect to determining the existence of probable cause. *See Commonwealth* v. *Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985).

Plaintiff attempts to minimize the effect of *Upton* by noting that the Supreme Court's earlier decision in the same case, *Massachusetts* v. *Upton*, 466 U.S. 727 (1984), did not analyze Article 14 before reaching the federal constitutional claim. Plaintiff's argumet fails to appreciate that the Supreme Judicial Court's decision interpreting Article 14 as being more protective than the Fourth Amendment was issued in response to this Supreme Court decision. Thus, at the time the Supreme Court considered the issue, the Supreme Judicial Court had not yet interpreted Article 14 to be more protective than the Fourth Amendment, and the Supreme Court's failure to analyze Article 14 therefore does not mandate a similar approach in this case.

Once the Supreme Judicial Court issued its decision in *Upton*, Article 14 could no longer be interpreted as merely paralleling the Fourth Amendment, and an unclear question of an enactment's validity under Article 14 became a proper ground for abstention. Even though each state may have the potential to interpret its constitution as affording greater protec-

tions than the federal constitution, abstention in this case was based on an actual interpretation of Article 14 rather than some as yet unexercised potential to interpret it in the future. Thus, contrary to plaintiff's argument, abstention on these grounds does not logically support abstention in every constitutional case.

III.

Plaintiff also disagrees with the analysis in Part V of the Opinion, which concluded that it would be inappropriate to address nationwide non-adjudicative fact issues incident to adjudication of plaintiff's federal constitutional claims before allowing an opportunity for state courts to resolve potentially dispositive issues of state law.

Plaintiff argues that I should not have conclude that the nature of the factual disputes before the court was a factor supporting abstention, and that the analysis in Part V indicates that defendant failed to meet his burden of proving the need for Rule 111. Plaintiff relies on a Third Circuit decision, *Conover* v. *Montemuro*, 477 F.2d 1073 (3d Cir. 1973), and the Wright & Miller treatise for the proposition that a dispute of evidentiary fact is a factor that weighs against *Pullman* abstention. However, Professors Wright and Miller do not support plaintiff's contention, but instead state that "the existence of fact issues ought not be an important consideration in determining whether to abstain." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242, at 470 (1978). Furthermore, plaintiff's arguments fail to recognize that Part V discusses the propriety of abstention with respect to *non-adjudicative* rather than adjudicative fact findings. A court's non-adjudicative fact findings do not depend on a party's success or failure in meeting its burden of proof with respect to evidentiary or adjudicative facts, but are rather wholly distinct from

adjudicative fact findings. By focusing on defendant's failure to produce evidence that would support an adjudicative fact finding of need for drug testing in the Boston Police Department, plaintiff fails even to address this court's conclusion with respect to the possibility of non-adjudicative fact findings regarding the Boston Police Commissioner's assertion of need for Rule 111.

Because plaintiff's arguments concern only adjudicative rather than non-adjudicative facts, I am not persuaded to modify the analysis or conclusions of Part V of the Opinion.

IV.

I have reviewed plaintiff's objections to Parts VI and VII of the Opinion and conclude that the analysis and conclusions stated therein need not be modified in any way.

V.

Defendant's memorandum primarily addresses the merits of plaintiff's claims rather than the propriety of the decision to abstain. Having reviewed defendant's arguments, I am not persuaded that I should modify the Opinion or Judgment of March 6, 1987.

ORDER

For the reasons stated in the foregoing Memorandum, it is ORDERERD:

Plaintiff's motion for relief from judgment (Docket No. 52) is denied.

Defendant's motion for relief from judgment (Docket No. 51A) is denied.

/s/ Robert E. Keeton
United States District Judge

Appendix K.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT T. GUINEY, individually
and as he is President and Representative
of the Boston Police Patrolmen's
Association, Inc.,
Plaintiff,

v.

CIVIL ACTION
No. 86-1346-K

FRANCIS M. ROACHE, as he is
Police Commissioner of the City
of Boston,
Defendant

Final Judgment
March 6, 1987

Plaintiff's prayer for a preliminary injunction is denied.

This action is dismissed, but subject to the following conditions:

(1) This dismissal is on grounds of abstention and is without prejudice on the merits.

(2) This court will retain jurisdiction to reopen this case upon motion supported by a showing that, after reasonable efforts to obtain relief (either preliminary or permanently) under state law, plaintiff cannot attain relief without resort to the federal constitutional claims asserted here.

/s/ Robert E. Keeton
United States District Judge

Appendix L.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT T. GUINEY, individually
and as he is President and Representative
of the Boston Police Patrolmen's
Association, Inc.,
Plaintiff,

v.

CIVIL ACTION
No. 86-1346-K

FRANCIS M. ROACHE, as he is
Police Commissioner of the City
of Boston,
Defendant

Opinion
March 6, 1987

KEETON, *District Judge*.

This is an action challenging Boston Police Department Rule 111, which authorizes urinalysis drug testing of department employees on both a reasonable suspicion and a random basis. Plaintiff seeks (1) a declaratory judgment that the Rule's random testing provision violates the Fourth and Fourteenth Amendments, and (2) equitable relief temporarily and permanently enjoining its enforcement. By consent of the defendant, the action has proceeded as a class action on behalf of all Boston police officers below the rank of sergeant. With the consent of both parties, in order to expedite the case, bypassed hearings

on plaintiff's prayer for preliminary injunction and on potentially dispositive defense motions, and proceeded directly to non-jury trial of the entire case.

Trial commenced on October 1, 1986, and on that same day the evidence was closed subject to supplementation pursuant to an agreement of the parties approved by the court. Thereafter plaintiff moved to reopen the evidence, and because of a lack of clarity with respect to the intent and effect of this motion and other submissions filed after October 1, the court convened a further conference on December 15, 1986, at which time a further stipulation was filed and the evidence was closed.

In addition to oral arguments of counsel and amici curiae, briefs have been filed by the parties and by Deputy Assistant Attorney General Robert J. Cynkar, Richard Greenberg, Mary Goetten, and Brian G. Kennedy of the Department of Justice, Civil Division, and by Attorneys Marjorie Heins and John Reinstein on behalf of the Massachusetts Civil Liberties Union, as amici curiae.

I.

The evidence before the court consists principally of a stipulation, as amended in open court on October 1, 1986 and in conference on December 15, 1986, by which the parties agreed to the following:

(1) The Plaintiff, Robert T. Guiney, is President and a member of the Boston Patrolmen's Association, Inc., a labor organization incorporated under the laws of Massachusetts consisting of approximately fifteen hundred (1500) Boston police patrolmen.

(2) The Defendant, Francis M. Roache, is Police Commissioner of the City of Boston.

(3) The rule which is at issue in this litigation, Boston Police Department Rule 111, was issued by the defendant in his capacity as Police Commissioner of the City of Boston on April 24, 1986, to be effective June 21, 1986, but not to be enforced by mutual agreement of the parties pending the ruling by this court.

(4) By issuing Rule 111, the defendant has adopted a rule and policy requiring Boston Police Officers to submit to urine testing for illegal drug use both on a reasonable suspicion basis and on a random, without cause, basis.

(5) Pursuant to such rule and policy, if a police officer refuses to take such test, he (or she) shall be subjected to disciplinary action, including suspension and/or discharge.

(6) Further, pursuant to such rule and policy, if a police officer's urine test is interpreted as "positive" (suggesting the existence of illegal substances within such police officer's bodily system), such police officer shall be subject to disciplinary action, including suspension and/or discharge.

(7) Moreover, pursuant to such rule and policy, the secondary confirmation test of any positive finding of any selected drug or drugs (except cannabinoids) resulting from the initial screening test performed on such urine samples, shall be accomplished by gas chromatography/mass spectrometry as described in Special Order 86-70 amending Rule 111 attached hereto and marked as "Exhibit A" which is hereby incorporated and made a part of this stipulation between the parties.

(8) Under such rule and policy the individual police officers selected to be tested by the Department will perform their bodily functions in private and unobserved as described in Special Order 86-70 amending Rule 111 attached hereto and marked as "Exhibit A" which is hereby incorporated and made a part of this stipulation between the parties.

Boston Police Department Rule No. 111, Drug Testing for Departmental Personnel, was adopted April 24, 1986. Rule 111 was amended twice in October 1986, first by Special Order 86-67, which was revoked, and then by Special Order 86-70. The parties stipulated on December 15, 1986 that as amended by Special Order 86-70, Rule 111 is as set out below. The phrase in Section 9 and the paragraph in Section 12 that were deleted by amendment are bracketed and the sentence in Sections 9, 10, and 12 that were added by amendment are underlined.

Sec. 1 This rule is issued to establish uniform internal policy and procedures to govern the administration of a screening process to test and control unauthorized use of illicit drugs among all sworn and civilian personnel of the Boston Police Department. The Department is seeking to test for drugs which have a high potential for abuse, have no medical use in treatment, and for which there is no safe protocol for medical use.

Sec. 2 This rule is written and promulgated to be used in conjunction with Rule 102 governing the general conduct, duties and responsibilities of the Boston Police Department personnel. It takes cognizance of the rights inherent in each individual of the Department under the Constitution of the United States of America and the Commonwealth of Massachusetts.

It is established to help combat the national epidemic in the illicit use of drugs and to combat illegal trafficking in drugs. It is adopted to rationally foster the efficient operation of the Boston Police Department and to establish a reasonable and uniform system by which the Department can monitor its employees for unauthorized drug use.

The Rule is necessary to preserve and protect the integrity of the Department and its personnel; to guard against the harmful consequences to the public good occasioned by the unauthorized unlawful use of, or the illegal trafficking in, illicit drugs by law enforcement personnel and to preserve and maintain a high degree of public confidence in all those charged with upholding public order and public safety.

Sec. 3 The Department hereby establishes two base methods of implementing this Rule to identify Department personnel who are users of certain controlled substances:

a. Testing of those individual subjects where facts are sufficient to constitute reasonable suspicion of controlled substance abuse as further described in Section 4; and

b. A universal random urinalysis procedure.

Sec. 4 In circumstances where the facts are sufficient to constitute a reasonable suspicion that a Department employee is a user of certain controlled substances, the Department shall have the right to require that employee to submit without delay to a urinalysis test.

Reasonable suspicion shall be based on information of objective facts obtained by the Department and the rational inferences which may be drawn from those facts.

The credibility of the sources of information whether by tip or informant, the reliability of the facts of information, the degree of corroboration, the results of De-

partment inquiry and/or other factors shall be weighed in determining the presence or absence of reasonable suspicion.

Sec. 5 There shall be a Drug-Testing Advisory Committee, members to be appointed by the Commissioner, which shall meet from time-to-time to advise the Commissioner on procedural and technical matters pertinent to the drug-testing program established by this Rule.

The members of the Committee shall include a representative of each of the official collective bargaining groups representing members of the Department; three or more medical specialists qualified in the various sciences pertinent to the conduct of drug-testing such as pharmacology, toxicology and pathology; and such other members as the Commissioner deems appropriate.

The Committee shall offer recommendations to the Commissioner on the procedures and mechanics of conducting a drug-testing program and on the science of drug-testing with a view to maintaining fairness, objectivity, accuracy and confidentiality in the entire drug-testing program. Also, the Committee shall make recommendations on the following:

a. Changes and improvements in science and technology which will improve the effectiveness of laboratory testing for the detection of drug abuse among Department personnel.
b. Appropriate external proficiency-testing and internal quality assurance procedures for evaluating the performance of drug-testing laboratories.
c. Procedures for the certification, decertification, and recertification of laboratories for drug analyses.
d. Make recommendations to improve the effectiveness of the drug-testing program.

Sec. 6 The employee-subject to be drug-tested will be selected by randomized independent computer process unless

otherwise to be tested on [a] reasonable suspicion basis. The subject will be notified of the test requirement just prior to transport to the medical facility or laboratory designated by the Department to obtain the urine sample. At the time of the test the subject will be notified of the specific drugs which will be screened by the test. The subject will be accompanied by a Testing Officer from the Department assigned to supervise the taking of the urine sample and responsible for proper conduct and uniform procedures of urine sampling process. The subject will be assigned a test code-identification for purposes of maintaining anonymity and to assure privacy throughout the sampling and testing procedure. At the sampling site the subject will be required to deposit a sample of urine into an approved container up to a required-minimum quantity necessary for laboratory testing purposes. The subject will be required to thoroughly wash hands and fingernails prior to urination and shall be required to sign and certify Department documentation that the coded identification on the sample container corresponds with test code-identification assigned to him/her. From the point of embarking and at all stages of the urine-sampling procedure the subject will be under the direct supervision of the Testing Officer and is expected to follow strictly each instruction of the Testing Officer. Following the completion of the urine-sampling procedure, the subject will then be re-transported to his/her original point of departure.

Sec. 7 Testing Officers shall be appointed or assigned by Commissioner from the Department with full authority to order personnel compliance to oversee the integrity of the Department's role in the personnel drug-screening process. They shall be responsible for the notification of the subject-employee of his/her random selection for

testing and of the specific drugs for the detection of which, the test will be administered.

The Testing Officer shall be responsible for the attendance, identification and transportation of personnel to-be-screened to the designated test site at the appointed time and shall certify as to the cleanliness of the surroundings, the sterility of the sample and the integrity of the entire sampling procedures.

The Testing Officer shall supervise and observe in the company of the medical officer or technician all aspects of obtaining, marking and packaging of individual urine samples including the following:

(A) To assure that the medical officer or technician is afforded the cooperation of the subject in securing the urine sample from the subject in the necessary amount into the test container. Also, to oversee the securing and sealing of the individual urine sample containers of each subject-employee; and

(B) The accurate matching of coded-identification of the subject with the sample and the containers including the seals and any packaging of the sample containers; and

(C) The exact completion and execution of the required legal documentation of chain-of-custody including appropriate identification and certification of [the] medical or technical officer participating in obtaining the urine sample from the test subject and by bonded courier if so employed; and

(D) The proper maintenance of anonymity of the subject with the medical or technical officer conducting the urine-sampling procedure; and

(E) If necessary, to arrange for transport of the specimen by designated bonded courier to the testing laboratory if located elsewhere; and

(F) To arrange for the return transportation of the subject; and

(G) All other steps necessary for the purpose of maintaining absolute control and legal accountability from initial notification of the subject to the final marking, sealing, packaging and transport arrangements for the urine samples to the testing laboratory together with the accompanying chain-of-custody documents, and the strict maintenance and final delivery of accurate Department ledgers and documents relating to the test, chain-of-custody and test records to the Commissioner or that person authorized by him to receive them; and

(H) To strictly apply all other more-detailed testing procedures as may be required by the Department prior to the effective date of actual testing.

Testing Officers shall attend an initial training seminar in the proper and legal administration of this personnel-drug-testing rule prior to the start of actual testing and such other additional training seminars as changes and modifications in the program or procedures may require.

Sec. 8 PERSONNEL SELECTION FOR RANDOM SCREENING

The selective procedure will be governed by a secured computer selection process. The selection of individual personnel to-be-screened will be effected by a computer program designed for random selection. Human intervention in this process is limited to the programming of the computer by an independent contractor hired outside the Department for the purpose according to contract specifications.

Sec. 9 Urine samples will be taken at a medical or laboratory site selected by the Department for this purpose. This facility may or may not be affiliated with the testing laboratory or facility which will be conducting the urinalysis process.

This facility must provide a clean and sanitary location for the urine-sampling process including washing facilities. It must also provide a competent person qualified in the practice of sterile urine-sampling and experienced in the legal requirements of chain-of-custody documentation and procedures. The person will be required to work cooperatively with the Testing Officer in obtaining from selected individuals under his/her direction [and in his/her presence] urine samples in the required quantity, in proper receptacles for purposes of laboratory urinalysis for controlled substances, and to arrange for marking, sealing, packaging, storing and final delivery of such specimens to the testing laboratory.

All personnel selected to submit a sample for urinalysis shall be provided a private sanitary area at the collection center. The individual will be in a hospital-type gown and will not have access to street clothes, purses, bags, etc. After providing the sample, the subject will call the testing officer or medical assistant. In the presence of the individual, the medical assistant will pour the sample into the plastic laboratory bottle, cap the bottle and place the tamper proof seal over the cap.

Sec. 10 Testing process of urine specimens of personnel shall be completed by a qualified medical laboratory selected by the Department which shall meet Department contract specifications which will ensure results are legally supportable and scientifically accurate.

With the delivery of each specimen, the Department will designate to the testing laboratory only certain specific drugs for which the specimen is to be analyzed. The testing laboratory will report findings only as to those specific substances contained in the Department request.

To ensure optimum accuracy the tests shall be drug-specific. The drug-abuse screening test will consist of two tests:

a. The initial test of each urine sample shall employ a methodology different from the secondary confirmation test.
b. The initial test shall use a thin-layer chromatography process unless a different process has been approved by the Department. The test process at the laboratory for the initial analysis will be completed in 24-48 hours.
c. The secondary confirmation test of any positive findings of specific drugs selected to be screened in the subject shall be accomplished by one of the following methods: enzyme immunoassay, gas liquid chromatography, mass spectrometry.
d. The test procedure for determining the presence of cannabinoids will be immunoassay. Secondary confirmation test of a positive finding for the presence of cannabinoids will be gas chromatography-mass spectrometry.
e. The foregoing drug-testing procedures are not meant to be an exhaustive compilation of the tests that will be or could be used to implement the personnel drug-screening program.
f. The testing laboratory will make provision to properly preserve, store and secure one aliquot of the original urine specimen to be reserved and made available for purposes of independent confirmation testing by experts chosen and authorized by the subject-employee. This employee-confirmation test will be conducted at the testing laboratory jointly with the experts representing the subject-employee and the laboratory chemists and experts of the testing laboratories which returned the orig-

inal urine-test findings. Also, the testing laboratory will make available to the inspection of the employee or his representative all records of primary and secondary confirmation testing done by the testing laboratory on the urine specimen provided by the employee.

g. *The confirmatory test will be a test different from the initial test. The test will be a gas liquid chromatography, mass spectrometry (GC/MS).*

Sec. 11 The testing laboratory contracted by the Department to test urine specimens under this Rule must continue the uninterrupted chain-of-custody procedure from receipt of specimens and to maintain internal chain-of-custody procedures which establish fundamental accountability and reliability of testing from a legal viewpoint at each stage in the handling, testing, and storing of specimens and reporting of test results. The testing laboratory will be subjected to appropriate external proficiency-testing and internal quality-assurance procedures for evaluating the performance of its testing process and procedures and for strict conformity with the contract specifications. The testing laboratory will not be allowed to know the identity of the subject tested. Strict confidentiality must be maintained throughout the entire testing and reporting process. Results of the test will be sealed and forwarded only to the Commissioner or that person authorized by the Commissioner to receive test results.

Sec. 12 [All personnel whose confirmatory test results in a positive finding for controlled substances, will be subject to the full range of discipline including discharge from the Department pursuant to M.G.L. Chapter 31, Sections 41-46 and Rule 109.]

Final scientific confirmation of the presence of one of the four harmful drugs (defined in the last sentence of Rule 111, section 1) in the urine sample of an employee shall set in motion the operation of Mass. General Laws Chapter 31, sections 41-46. These sections provide and protect the legal rights of tenured Civil Service employees. Under these provisions the employee is entitled to a full department hearing and a subsequent 'de novo' Civil Service hearing at which hearings he/she is afforded the opportunity to present a complete legal defense and exculpatory evidence and to contest all scientific and other evidence presented by the Department pursuant to the complaints. The employee shall be charged under the general complaint of conduct unbecoming an employee (Rule 102, section 3) and the unauthorized use of illegal drugs (Rule 102, section 16) under Boston Police Rules and Regulations. The Department shall bear the burden of proving the presence of illegal drugs in the urine sample; and that the employee knowingly violated Regulations 102, sections 3 and 16.

A finding against the employee shall subject him/her to a full range of discipline under the Rules and Regulations of the Boston Police Department.

A finding for the employee shall constitute an exoneration of the employee.

Sec. 13 The provisions of this regulation are severable and if any of its provisions shall be held unconstitutional or otherwise invalid by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

Francis M. Roache
Police Commissioner

The first sentence of Section 12, added by Special Order 86-70, refers to "the four harmful drugs (defined in the last sentence of Rule 111, Section 1)." No such definition appears at the cited place, and I have not found any other reference to "four harmful drugs" in Rule 111. No contention of either party refers to this discordant reference, and the evidence fails to explain it, unless the answer is supplied by the reference in Section 16 of Rule 102 to "prescription drugs, controlled substances, narcotics or hallucinogens except when prescribed. . . ." I conclude that, in any event, the resulting ambiguity has no bearing on disposition of issues now before the court.

The amendment of Section 9 of Rule 111 was aimed at protecting privacy, and it is undisputed that it rendered moot those arguments previously advanced on grounds of invasion of privacy because of requirements (which appeared in the rule before amendment) that the police officer be observed during urination.

The amendment of Section 10 added the final two sentences of that section, requiring that the confirmatory test be a different test and be a gas liquid chromatography, mass spectrometry (GC/MS).

The amendment of Section 12 was apparently intended to address concerns raised by the court during oral argument with respect to the possibility that the original Rule 111 would subject even an innocent ingestor of a controlled substance (for example, someone who had been "set up" or drugged against his or her will) to "the full range of discipline including discharge." Unlike the original Section 12, under which discipline might have been imposed solely upon a positive finding for controlled substances, the amended Section 12 appears to place a burden on the Police Department to prove that the employee knowingly violated Rule 102 — either Section 3 (conduct unbecoming an employee) or Section 16 (unauthorized use of illegal drugs), or both.

II.

The parties and amici curiae have vigorously argued an extensive range of important and debatable constitutional issues, focusing on Rule 111's validity under the Fourth and Fourteenth Amendments, that they urge the court to address. I conclude, however, for reasons stated below, that as a matter of sound discretion I should abstain from deciding these constitutional issues at this time.

Under the doctrine referred to as *Pullman* abstention, derived from *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), a federal court should ordinarily decline to rule on a constitutional challenge to state action when the case presents unsettled questions of state law which are potentially dispositive. *See* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4242 (1978). As the doctrine has been developed by the Supreme Court, *Pullman* abstention is appropriate where the state law at issue is unclear and subject to an interpretation that would avoid or modify the federal constitutional issues. *See, e.g., Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498 (1972). As explained in *Pullman*, this type of abstention both allows federal courts to avoid "the friction of a premature constitutional adjudication" and shows a "scrupulous regard for the rightful independence of the state governments[.]" *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. at 500-501 (citation omitted).

In *Pullman*, the state action at issue was an order of the Texas Railroad Commission requiring the presence of Pullman conductors (who were all white) as opposed to Pullman porters (who were all black) in all railroad sleeping cars. The Pullman Company and the railroads, joined by Pullman porters who were permitted to intervene, challenged the order as a violation of the Equal Protection, the Due Process, and the Commerce Clauses of the United States Constitution, and as unauthorized

by Texas law. The court held that the district court should have abstained from deciding the federal constitutional issue in order to allow for a definitive ruling on the state law issue by the state courts. Writing for the Court, Justice Frankfurter explained that a decision on the "more than substantial" constitutional issue presented by the Fourteenth Amendment claims of the Pullman porters should be avoided if the state issue was dispositive:

> [The constitutional issue] touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.

Railroad Comm'n of Texas v. *Pullman Co.*, 312 U.S. at 498.

For the reasons stated below, I conclude that the present case is so closely analogous to *Pullman* that abstention is appropriate.

III.

At oral argument, which occurred before the amendment of Section 12 of Rule 111, the court inquired of counsel for defendant by what means the court could ascertain the consequences that would or might follow a "positive" result of a screening test administered under Rule 111, and by what substantive and procedural standards these consequences would be determined. As was observed at that time, if the substantive definition of "just cause" is merely a positive test result, the person tested would be subject to arbitrary discipline. He or she could not defend against disciplinary action, for example, by proving that the test result came about because the police

officer had been "set up" or drugged against his or her will and without knowledge that he or she was ingesting a controlled substance. For this reason, a substantive standard concerned merely with test result would present very different issues of validity of the Rule, both under state law and under federal constitutional law, from the issues that would be presented if the substantive standard required, as a prerequisite to discipline, the knowing ingestion of a controlled substance.

After oral argument, Section 12 of Rule 111 was amended in an apparent attempt to specify the procedural and substantive standards governing disciplinary proceedings based on violations of the Rule. The amended Section 12 reads as follows:

> Final scientific confirmation of the presence of one of the four harmful drugs (defined in the last sentence of Rule 111, section 1) in the urine sample of an employee shall set in motion the operation of Mass. General Laws Chapter 31, sections 41-46. These sections provide and protect the legal rights of tenured Civil Service employees. Under these provisions the employee is entitled to a full department hearing and a subsequent 'de novo' Civil Service hearing at which hearings he/she is afforded the opportunity to present a complete legal defense and exculpatory evidence and to contest all scientific and other evidence presented by the Department pursuant to the complaints. The employee shall be charged under the general complaint of conduct unbecoming an employee (Rule 102, section 3) and the unauthorized use of illegal drugs (Rule 102, section 16) under Boston Police Rules and Regulationss. The Department shall bear the burden of proving the presence of illegal drugs in the urine sample; and that the employee knowingly violated Regulations 102, sections 3 and 16.

> A finding against the employee shall subject him/her to a full range of discipline under the Rules and Regulations of the Boston Police Department.
> A finding for the employee shall constitute an exoneration of the employee.

The provisions of the Massachusetts civil service laws to which Section 12 of Rule 111 refers concern hearings, judicial review, seniority rights, civil actions, reimbursement of expenses, and reinstatement of tenured civil service employees who are subjected to discipline, including Boston Police Department personnel. *See* Mass. Gen. L. ch. 31, §§ 41-46 (1984); *see also* Mass. Gen. L. ch. 31, § 51 (1984). They do nothing to clarify substantive standards for susceptibility to discipline.

Section 41 of Chapter 31 declares:

> Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. . . .

Mass. Gen. L. ch. 31, § 41 (1984). When an appointing authority undertakes to impose any of the foregoing forms of discipline "for just cause," it is required to provide a written notice,

> which shall include the action contemplated, the specific reason or reasons for such action and a copy

> of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons . . . .

Id. Also, the appointing authority shall "provide such employee a written notice of the time and place of such hearing . . . ." *Id.* The statute also provides that the lesser discipline of suspension for just cause for a period of five days or less may be imposed "without a hearing prior to such suspension." *Id.* However,

> [s]uch suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions, or by a chief of police or officer performing similar duties regardless of title, or by a subordinate to whom such chief or officer has delegated such authority. Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension.

Id.

It may be that this statute does not protect a tenured employee against any other form of discipline than those forms it refers to and, by implication perhaps, any other form of discipline of like or greater severity. Perhaps additional protection is afforded by other statutes. *E.g.*, Mass. Gen. L. ch. 31, § 62

(1984) (regulating punishment duty of police officers). Yet, the statutes as a whole may not regulate all possible forms of discipline. If they do not, a court must look elsewhere for guidance as to substantive standards applicable to a particular form of discipline.

In addition to referring to these civil service statutes, Section 12 of Rule 111 refers to Sections 3 and 16 of Rule 102, governing the condcut, general rights, and responsibilities of Boston Police Department Personnel. Section 3 of Rule 102 states:

> CONDUCT: Employees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees.

Section 16 of Rule 102 states:

> USE OF DRUGS: Employees shall not use any prescription drugs, controlled substances, narcotics or hallucinogens except when prescribed in the treatment of the employee by a registered physician or dentist. When prescription drugs, controlled substances, narcotics or hallucinogens are prescribed for him, an employee shall notify his superior officer or supervisor, in writing, before his next tour of duty of such prescription. Prescription drugs, controlled substances, narcotic or hallucinogenic shall mean any substances so defined in Massachusetts General Laws, Chapter 94C.

> A superior officer [or] supervisor shall, when notified by an employee that any prescription drugs, controlled substances, narcotics or hallucinogens have been prescribed and ingested, notify the Department physician of the quantity of the substance which the employee reports has been prescribed and shall be guided by the Department physician's opinion as to whether or not the employee can fulfill his duties while under the influence of such prescribed substance. In the event that the Department physician cannot be reached, the superior officer or supervisor shall exercise his own best judgment as to whether or not the employee, reporting the use of such substance, should perform his Departmental duties. Whether or not the employee does continue to perform his Department duties shall not affect the responsibility of the superior officer or supervisor to notify the Department physician of the use of such substance as soon as possible.

Although Section 2 of Rule 111 states that Rule 111 "is written and promulgated to be used in conjunction with Rule 102," only Sections 3 and 16 of Rule 102, which are specifically mentioned in Section 12 of Rule 111, potentially contain a substantive standard as to what constitutes a cause, or a "just cause," for discipline following a positive result in a drug screening test.

Unlike the original version of Section 12, the amended Rule specifies that the employee will be charged with violating Sections 3 and 16 of Rule 102 and places a burden on the Department to prove that the employee "knowingly violated" those provisions. Thus, the amended Section 12 appears to create a substantive standard of knowing violation of conduct unbecoming an employee or unauthorized use of drugs. This may satisfy concerns about the unavailability (before the

amendment) of a defense such as being "set up" or even of passively ingesting fumes or smoke in a room. I note, however, that ambiguities in the substantive standard may remain. For example, the parties' stipulation states that pursuant to Rule 111,

> if a police officer's urine test is interpreted as "positive" (suggesting the existence of illegal substances within such police officer's bodily system), such police officer shall be subject to disciplinary action, including suspension and/or discharge.

Stipulated Agreement of Facts Between the Parties at para. 6 (as amended December 15, 1986). This suggests that the parties themselves interpret Rule 111 as subjecting an officer to disciplinary action upon a positive test result alone. However, I need not decide whether a state court decision on a challenge to Rule 111 on these grounds, or on any other grounds of state statutory or decisional law, might modify or avoid the constitutional issues that have been argued here, because I conclude (for reasons stated below) that substantial issues of state constitutional law exist which make abstention appropriate in this case.

IV.

A potentially dispositive state law ground for decision is whether Rule 111 violates Article XIV of the Declaration of Rights of the Massachusetts Constitution, which declares:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously sup-

> ported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Mass. Const. pt. 1, art. 14.

The Supreme Court has held that *Pullman* abstention may be appropriate in at least some circumstances in which the unsettled question of state law involves an evaluation of the validity of a challenged statute under the state constitution. *See, e.g., City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959). Abstention to allow state courts to evaluate a statute under a state constitutional provision may be most appropriate where the state provision is substantively different from the federal provision at issue. *See Reetz* v. *Bozanich*, 397 U.S. 82 (1970) (state constitutional provisions concerning fish resources). Conversely, the Court has held that abstention is not required where the provision of the state constitution to be interpreted parallels a provision of the United States Constitution. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237 n.4 (1984). Allowing state courts to interpret unclear statutes (and unclear rules or ordinances of local authorities) in light of the unique provisions of the state's own constitution serves the federalism concerns that underlie *Pullman* abstention and also ensures that federal courts do not render unnecessary decisions concerning the federal constitution. On the other hand, where the state constitutional provision is modeled on or substantively identical to a federal constitutional provision, there are no uniquely state interests at stake, and the policies underlying *Pullman* abstention would not be served by abstaining in order to allow a state court to interpret

the statute, ordinance, or rule in light of the state constitution. *See* 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4242, at 462-64 (1978); Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1099 n.108 (1974).

Although the search and seizure provision of the Massachusetts Constitution is substantively similar to the Fourth Amendment of the United States Constitution, Article 14 of the Declaration of Rights, which was adopted in 1780, was clearly not modeled on the Fourth Amendment, since the Bill of Rights was not proposed in Congress until 1789 and was not ratified until 1791. Indeed, some scholars believe that the Fourth Amendment was modeled on Article 14 of the Declaration of Rights, *See* J. Landynski, *Search and Seizure and the Supreme Court* 38 (1966); *see also Harris* v. *United States*, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting).

Furthermore, it is clear that the Massachusetts Supreme Judicial Court does not interpret Article 14 as if it were merely a counterpart to the Fourth Amendment but instead interprets it as offering protections beyond those established by the Fourth Amendment. In *Commonwealth* v. *Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), the Supreme Judicial Court held that the test for determining probable cause is stricter under Article 14 of the Declaration of Rights than under the Fourth Amendment. In an earlier decision in the same case, the Supreme Judicial Court had evaluated the existence of probable cause to issue a search warrant under the "totality of the circumstances" test announced in *Illinois* v. *Gates*, 462 U.S. 213 (1983), and concluded that the search at issue was unreasonable under the Fourth Amendment. *Commonwealth* v. *Upton*, 390 Mass. 562, 458 N.E.2d 717 (1983). On appeal of this decision, the United States Supreme Court rejected the Supreme Judicial Court's interpretation of *Gates* and held that there was probable cause within the meaning of the Fourth Amendment to issue the search warrant. *Massachusetts* v. *Upton*, 466 U.S. 727

(1984). On remand, the Supreme Judicial Court concluded that Article 14 "provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause" and held that the search was unreasonable under the Massachusetts Constitution. *Commonwealth* v. *Upton*, 394 Mass. at 373, 476 N.E.2d at 556. Thus, the Commonwealth's highest court has explicitly interpreted Article 14 to be independent of the Fourth Amendment and to provide greater substantive protection than the Fourth Amendment, at least with respect to determining the existence of probable cause.

Because Article 14 is not simply a counterpart to the Fourth Amendment but has been interpreted to be independent from it, the question of Rule 111's constitutionality will present different issues under the Massachusetts Constitution than under the United States Constitution. The Massachusetts Supreme Judicial Court's interpretation of Article 14 creates a real possibility that Rule 111 could be held to violate Article 14 regardless of whether or not it violates the Fourth and Fourteenth Amendments. Thus, an evaluation of Rule 111's validity under Article 14 could obviate the need to consider its validity under the Fourth and Fourteenth Amendments and could therefore allow this court to avoid rendering an unnecessary constitutional ruling.

I conclude that the issue of whether Rule 111 violates Article 14 should be resolved before the federal constitutional issue is reached, and preferably should be resolved by the state courts rather than this court. As the Supreme Court held in *Pullman*, where the state law issue is unclear, a federal court's decision on the state law "cannot escape being a forecast rather than a determination." *Texas Railroad Comm'n* v. *Pullman Co.*, *supra*, 312 U.S. at 499. So long as the parties have the means to "secur[e] a definitive ruling in the state courts . . . with full protection of the constitutional claim, the district

court should exercise its wise discretion by staying its hands." *Id.* at 501.

The federalism concerns which support leaving to state courts decisions of the validity of state laws under a state constitution are arguably more limited in this case than in *Pullman* because the "legislative" action challenged here is that of the Boston Police Commissioner, rather than a state legislature, and the enforcement at issue is that of a municipal police department rather than that of a state agency. Nevertheless, as observed in Part III, *supra*, Boston police personnel are subject to the statewide civil service laws, including the statutory requirement that tenured employees not be discharged or subjected to certain forms of discipline without a hearing to determine the existence of just cause. *See* Mass. Gen. L. ch. 31, §§ 41-46 (1984). Because the civil service statutes and disciplinary procedures apply to Boston Police Department employees (as well as many other city and municipal employees), and state agencies are implicated in administrative procedures that may be invoked, a challenge to Rule 111 necessarily implicate state policies and state agencies.

V.

An additional factor supporting abstention in this case involves the nature of the factual disputes before the court. In order to sustain Rule 111 against a Fourth and Fourteenth Amendment challenge, the defendant must show a compelling need outweighing the Fourth and Fourteenth Amendment interests that are sacrificed by any rule that subjects all police personnel to either regular or random testing for traces of controlled substances in their urine. This burden might arguably be satisfied either (1) by evidence offered in the case sub judice that supports a fact finding that such a compelling need exists because of circumstances distinctive to the Common-

wealth of Massachusetts or the Boston Police Department, or (2) by a showing that such a compelling need exists in police departments generally throughout the United States because of facts common to such departments generally.

A showing of the first type, which would present to the court an adjudicative fact issue distinctive to this case, has not been seriously attempted in this case. Although compelling need has been argued in the written briefs submitted by the defendant and by the Department of Justice amici, no evidence was proffered at trial to support an adjudicative fact finding of such need. The only evidence in the record that could even tend to support such a fact finding is the statement in the affidavit of Deputy Superintendent Arthur Morgan that, "[i]n 1985 there were 3 police officers discharged for misconduct directly related to involvement with illicit controlled substances. . . . [I]n 1970 through 1983 there were no terminations for that reason." Affidavit of Arthur Morgan at para. 1 (as amended October 3, 1986). This evidence is plainly insufficient to support an adjudicative fact finding that circumstances distinctive to the Boston Police Department have created a compelling need that outweighs the Fourth and Fourteenth Amendment interests of the department employees who are subjected to drug testing under Rule 111. *Cf. Penny* v. *Kennedy*, 648 F. Supp. 815, 816 (E.D. Tenn. 1986) (evidence consisting of two police officers having tested positive in the 1985 urine tests, police chief's statement that 90% of department had no drug problem, officer's statement and "rumors" that there had been switched samples in 1985 test, tip from FBI that an officer had been in contact with a drug dealer, and pre-1985 statement from officer who admittedly used marijuana that "several officers used marijuana," did not justify mass drug testing of officers without reasonable suspicion); *Lovvorn* v. *City of Chattanooga, Tenn.*, 647 F. Supp. 875, 882 (E.D. Tenn. 1986) (evidence that several fire fighters

tested positive and "some" switched samples in 1985 tests, without "objective facts concerning deficient job performance or physical or mental deficiencies on the part of [the city's] fire fighters, either in general or with respect to specific personnel" did not support finding of an increased incidence of drug abuse in the department that posed a threat to its readiness or efficiency); *National Treasury Employees Union* v. *von Raab*, 649 F. Supp. 380, 390 (E.D. La. 1986) (record with "conspicuous absence of any statistics . . . showing any drug problem whatsoever among federal workers" could not justify drug testing of customs officials without reasonable suspicion), *stay pending appeal denied*, 808 F.2d 1057 (5th Cir. 1987); *American Fed'n of Gov't Employees, AFL-CIO* v. *Weinberger*, F. Supp. , No. CV486-353 (S.D. Ga. Dec. 2, 1986) (record with "no evidence whatsoever" that drug problem existed among civilian police officers whom Army sought to have tested would not justify testing without reasonable suspicion); *Caruso* v. *Ward*, 133 Misc.2d 544, 506 N.Y.2d 789 (N.Y. Sup. Ct. 1986) (evidence that 22 police officers tested positive for drug use in force of over 26,000 could not support finding that drug use was more than "a very occasional problem at best"). Moreover, the factual premises for the adoption of Rule 111, recited in the text of the Rule itself (*see* Section 2 of the Rule, quoted in Part I above) are focused on an asserted "national epidemic in the illicit use of drugs" rather than the particular circumstances existing in the Boston Police Department.

The defense argument rests, then, on an assertion that this court should determine the existence of a national need (or at least should determine that the recited factual premise of a national need is supportable as a fact finding by the Boston Police Commissioner) without receiving evidence on the subject. Such a determination is appropriate only if this or a higher court might properly make a non-adjudicative fact finding of

such a need (or at least determine that the Police Commissioner's non-adjudicative fact finding of such a need is supportable) as a basis for a ruling of law that, if not reversed on review by a higher court, would stand as a precedent and not merely as a fact finding applicable only to the case at hand. *Cf. Massachusetts Medical Soc'y* v. *Dukakis*, 637 F.Supp. 684, 689 (D. Mass. 1986), *appeal filed*, No. 86-1575 (1st Cir. June 18, 1986).

In a few reported cases, a finding of this type (non-adjudicative in nature) appears to have been made, implicitly if not explicitly, to support random drug testing. *E.g.*, *McDonell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987) (need for prison security justifies drug testing of prison employees on random or uniform basis; court did not discuss record with respect to actual drug problem); *Shoemaker* v. *Handel*, 795 F.2d 1136 (3d Cir.) (administrative search exception to Fourth Amendment warrant requirement applied to urinalysis and breathalyzer testing of jockeys in heavily regulated horse racing industry in light of state interest in assuring public of integrity of the industry), *cert. denied*, U.S. , 107 S. Ct. 577 (1986); *Fraternal Order of Police, Newark Lodge No. 12* v. *City of Newark*, No. L-095001-85E, slip op. at 20 (N.J. Super. Ct. Law Div. March 20, 1986) (court could take "judicial notice" from "information available to everybody" that drug abuse is "pervasive throughout every aspect of the population" and conclude that "some of those affected may find their way into the Police Department"). *But see McDonell* v. *Hunter*, *supra*, 809 F.2d at (Lay, C.J., concurring in part and dissenting in part ("Neither the environment of the prison workplace nor a well-meant desire to stem the use of illicit drugs should be used to tip the balance of Fourth Amendment interests in favor of the state without factual findings on the record to prove the institution's real needs."); *Caruso* v. *Ward*, *supra* (statistics concerning drug abuse in adolescents, department applicants, and

population at large held not relevant to showing of particularized need).

It may reasonably be argued that a similar non-adjudicative fact finding of compelling need that outweighs intrusions on privacy has been implicit, if not explicit, in decisions upholding some limited forms of driver screening on the highways as a means of deterring and combatting the public menace of driving under the influence of intoxicants or drugs. *E.g.*, *State* v. *Garcia*, 500 N.E.2d 158 (Ind. 1986). Perhaps similar reasoning would be extended to drug testing of all operators of trains or other vehicles of public carriers involved in an accident just before the tests were administered. *Cf. Division 241, Amalgamated Transit Union (AFL-CIO)* v. *Suscy*, 538 F.2d 1264 (7th Cir.) (upholding testing of bus drivers after accidents), *cert. denied*, 429 U.S. 1029 (1976); *American Federation of Gov't Employees, AFL-CIO* v. *Weinberger, supra* (injunction against implementation of drug testing of government employees absent reasonable suspicion not applied to testing after accidents involving government property had occurred). This type of non-adjudicative fact finding may also have been implicit in that part of the Third Circuit's decision in *Shoemaker, supra*, that upheld the breathalyzer testing of all jockeys on a daily basis.

Where the proposed testing is to occur promptly after the subject's having been involved in an accident or race or other event during which being under the influence of drugs would have affected the integrity of the race or the likelihood of fault contributing to the accident, a test may be aimed at detecting whether one is currently under the influence of drugs (and thus likely also to have been under the influence of drugs during the relevant performance). Here, in contrast, the test is aimed at determining whether the police officer has in his or her system a residue of controlled substances, which has no appreciably stronger tendency to evidence that any performance has

been affected than to evidence the ingestion of controlled substances off duty and without physical effects during performance of duty. Of course, the public has an interest in ensuring that officials (police officers as well as others) do not violate enacted laws, including those against use of controlled substances, even while off duty and without effect on performance other than through reduced public confidence in the professionalism and integrity of public employees. But the issue is whether when only this interest is involved, it alone outweighs interests protected by the Fourth and Fourteenth Amendments rather than doing so only in combination with the additional weight of interests such as those in the integrity of a specific race, the investigation of a specific accident, or a public program aimed at determining in immediate circumstances whether persons then driving on the highway are impaired.

A decision that the public interest asserted here by defendant (and by the Department of Justice amici) outweighs the Fourth and Fourteenth Amendment interests of the police personnel could only be based upon non-adjudicative fact findings concerning (a) the public interest in ensuring that police officers or other public officials do not use illicit drugs, and (b) a need for the type of drug testing prescribed by Rule 111 in order to vindicate that public interest. A non-adjudicative fact finding that this public interest outweighs the Fourth and Fourteenth Amendment rights of the police officers who would be subjected to drug testing under Rule 111 might be based on factual assertions that apply to the nation as a whole rather than to Massachusetts or the City of Boston alone. In contrast, a non-adjudicative fact finding that the asserted public interest outweighs rights protected by the Massachusetts Constitution might be a finding concerning circumstances distinctive to the Commonwealth of Massachusetts rather than circumstances common throughout the nation.

It would be appropriate to assume, without fully considering the available evidence, that the scope of the nationwide prob-

lem of drug abuse is identical with the scope of the problem in each separate state. Also, just as evidence of the scope of the problem may vary considerably among the states, so may the other public interests of the different states that would be implicated. For example, even if evidence of drug abuse statewide in Massachusetts should lead a Massachusetts court to make a non-adjudicative fact finding in support of a legal ruling that a drug testing program such as Rule 111 is or is not valid under the Massachusetts Constitution, still a court of a different state might reach exactly the opposite non-adjudicative fact finding for that state. In contrast, a non-adjudicative fact finding made by a federal court in applying the United States Constitution might not be sensitive to the varying circumstances of the different states and might instead be based on evidence or assumptions about nationwide circumstances.

I conclude that it would be inappropriate for a federal court to address nationwide non-adjudicative fact issues incident to adjudication of the Fourth and Fourteenth Amendment claims in this case before an opportunity has been allowed for resolution of this controversy on the basis of potentially dispositive issues of state constitutional law.

VI.

It might be argued that this court's declining to address the constitutional issues argued by the parties, and especially those issues concerned with whether random testing is offensive to constitutional standards, is inconsistent with the actions taken by other federal courts which, under similar circumstances, have decided the constitutional issues rather than abstaining. *See, e.g., McDonell* v. *Hunter*, 809 F.2d 1302 (8th Cir. 1987) (Iowa Department of Corrections policy of drug testing officials on uniform or systematic random basis held reasonable under Fourth Amendment); *Shoemaker* v. *Handel*, 795 F.2d 1136

(3d Cir.) (New Jersey statute providing for urinalysis and breathalyzer testing of jockeys valid under administrative search exception to Fourth Amendment), *cert. denied*, U.S. , 107 S. Ct. 577 (1986); *Lovvorn* v. *City of Chattanooga, Tenn.*, 647 F. Supp. 875 (E.D. Tenn. 1986) (mandatory drug testing of city fire fighters without reasonable suspicion and without clearly defined standards to protect individuals' expectations of privacy violated Fourth Amendment); *Penny* v. *Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986) (drug testing of city police officers without reasonable suspicion violated Fourth Amendment); *Capua* v. *City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (unannounced, observed collection of urine samples from city fire fighters without reasonable suspicion violated Fourth Amendment).

McDonell, *Lovvorn*, and *Penny* can all be distinguished from this case on the ground that in each of those cases, the search and seizure provision of the state constitution had been interpreted to be substantially the same as the Fourth Amendment, and therefore could not have provided a proper basis for abstention. *See State* v. *Lakin*, 588 S.W.2d 544 (Tenn. 1979) (Article 1, section 7 of Tennessee Constitution identical in intent and purpose to Fourth Amendment and ordinarily should be construed alike); *Latham* v. *Sullivan*, 295 N.W.2d 472 (Iowa Ct. App. 1980) (Article 1, section 8 of Iowa Constitution substantially the same as Fourth Amendment). *Shoemaker* v. *Capua* cannot be distinguished on the same grounds, however, because the New Jersey Supreme Court has interpreted the search and seizure provision of the New Jersey Constitution as providing greater protections than the Fourth Amendment. *See, e.g., State* v. *Novembrino*, 105 N.J. 95, 519 A.2d 820 (1987).

I nevertheless conclude that one should not read these decisions as precedents against abstention, because in none of these cases does it appear that abstention issues were raised or considered, either by the parties or by the court spontaneously.

The court in *Capua* did note that exhaustion of state remedies is not a prerequisite to bringing an action pursuant to 42 U.S.C. § 1983. *See Capua* v. *City of Plainfield*, 643 F. Supp. at 1512, n.1. The *Pullman* abstention doctrine, however, is quite distinct from exhaustion requirements, and the Supreme Court has held that abstention may be appropriate in § 1983 actions. *E.g.*, *Elkins* v. *Moreno*, 435 U.S. 647 (1978). *See also* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1131-34 (1974).

Because none of the decisions cited immediately above addressed the issue of abstention, I conclude that they are not to be regarded as precedents overriding the well-established rule of *Pullman* and its progeny that a federal court should ordinarily decline to rule on a federal constitutional challenge to state action when the case presents unsettled questions of state law, the resolution of which may avoid or modify the federal constitutional issue.

In addition, I note that the First Circuit recently decided a federal constitutional issue in a case which involved a challenge to a state statute in circumstances that are arguably similar to those in this case. *See L.L. Bean, Inc.* v. *Drake Publishers, Inc.*, F.2d , No. 86-1202 (1st Cir. Feb. 10, 1987). In *L.L. Bean*, the defendant published a prurient parody of the L.L. Bean catalogue, and L.L. Bean sued under the state trademark antidilution statute, Me. Rev. Stat. Ann. tit. 10, § 1530 (1981). The district court held that the statute applied to the parody and that its application did not abridge the publisher's First Amendment rights, and therefore enjoined publication of the parody. *L.L. Bean, Inc.* v. *Drake Publishers, Inc.*, 625 F. Supp. 1531 (D. Me. 1986). On appeal, the First Circuit did not review the district court's holding on the reach of the statute, concluding instead that it would be inappropriate for the court to construe the statute in the first instance, and

held that the injunction violated the First Amendment. In dissent, Chief Judge Campbell argued that before reaching the question of the statute's constitutionality, the court should have allowed the state court to decide whether a parody of that nature would violate the statute. *L.L. Bean, Inc.* v. *Drake Publishers, Inc.*, *supra*, slip op. at 20 (Campbell, C.J., dissenting).

In *L.L. Bean*, the district court reached the constitutional issue only after determining that the state law issue was clear, and therefore did not face an issue of state law that it considered to be unclear. The majority declined to review this ruling on appeal. Although the court might have concluded that the state law issue was unclear had it chosen to review the district court's ruling (as Chief Judge Campbell apparently did), the majority chose to let that part of the district court's ruling stand and proceeded to decide the constitutional issue. In the present case, in contrast, I have concluded that the state law issue is unsettled and unclear. I therefore conclude that the First Circuit's decision in *L.L. Bean* should not be interpreted as a precedent against abstention in the circumstances of the present case.

VII.

Having concluded that abstention is appropriate in this case, I must now consider what procedures should be followed in order to ensure that the plaintiff has an opportunity to obtain a definitive ruling on his state law claims in a state court without sacrificing his ability to have his federal constitutional claim heard by this court if he is unable to receive redress through those state law claims. In *Pullman*, the Supreme Court ordered abstention only in the absence of any showing that a definitive state court ruling could not be obtained with full protection of the federal constitutional claim. *Texas Railroad*

Comm'n v. *Pullman Co.*, *supra*, 312 U.S. at 501. The Court remanded the case to the district court "with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness in the state court." *Id.* at 501-02.

In *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Supreme Court explained the procedures to be followed by a federal litigant who initiates proceedings in state court as a result of an abstention order but seeks to preserve his federal constitutional claims for consideration by the federal court should he fail to obtain relief on his state law claims. Pursuant to the *England* doctrine, this type of litigant should bring both his state and federal claims before the state court so that the state statute can be construed in light of the federal claims, *see Government & Civic Employees Organizing Comm., CIO* v. *Windsor*, 353 U.S. 364 (1957), but should inform the state courts and give notice that he does not seek to have the federal claims decided there and instead intends to return to the federal court for decision on the federal claims, if necessary. *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. at 421.

Another means for having the state law issues presented to state courts is to have the federal court certify a specific question or questions to the highest state court. This approach has been favored by commentators because, where available, it generally provides a far swifter means to secure a definitive ruling on the state law issues than can be achieved by the litigants initiating proceedings in a lower state court and seeking further review if necessary. *See, e.g.*, Field, *The Abstention Doctrine Today*, 125 U. Pa. L. Rev. 590, 605-09 (1977). *Cf. L.L. Bean, Inc.* v. *Drake Publishers, Inc.*, F.2d , No. 86-1202, slip op. at 20-23 (1st Cir. Feb. 10, 1987) (Campbell, C.J., dissenting) (arguing that court should not have decided constitutionality of state statute without first certifying issue of state law to Maine Supreme Judicial Court).

Although the Massachusetts Supreme Judicial Court has authorized certification of questions from federal courts, *see* S.J.C. Rule 1:03 (1986), I conclude that certification would not be appropriate in this case. The Supreme Judicial Court requires a certification order to set forth:

> (1) the question of law to be answered; and
> (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

S.J.C. Rule 1:03, § 3 (1986).

On the present record, in which the parties have chosen to focus only on federal constitutional issues and not upon the state law issues (either under the state constitution or under other state law), this court could not fashion a certification order that would meet these requirements. It may be argued that no trial record is essential insofar as the issues would depend upon non-adjudicative fact finding. Nevertheless, the possibility remains that the Supreme Judicial Court would decline to decide the state constitutional law issue before examining other potentially dispositive state law issues, including issues under the state civil service laws suggested by Part III of this Memorandum, *supra*. The record in this case is inadequate even to identify all such issues, and the more clearly inadequate to frame the questions of state law to be answered.

I therefore conclude that certification of questions of state law to the Supreme Judicial Court would not be efficacious, and that procedures such as those explained in *England* v. *Louisiana State Boad of Medical Examiners*, *supra*, are sufficient to protect the plaintiff's interests in this case. I reach this conclusion having considered the concerns raised by commentators about the delays inherent in the *England* procedures. *See, e.g.*, Field, *The Abstention Doctrine Today*, 125 U. Pa.

L. Rev. 590, 605-09 (1977). I conclude, however, that concerns about the delays imposed by abstention do not in this case outweigh the well-established judicial policy of abstaining to avoid unnecessary constitutional decisions when the case presents unsettled questions of state law which are potentially dispositive. The delay in this case is not incident to abstention itself, but stems from the need to avoid the impropriety of deciding constitutional questions on the basis of unsupported assumptions about state law. Furthermore, I note that the Massachusetts courts offer plaintiff an opportunity to seek an expedited hearing on his state law claims should he reassert his prayer for injunctive relief in a state court action. Thus, the delay which plaintiff may encounter in securing a decision on his federal constitutional claims can be minimized by state court procedures available to expedite disposition of equitable claims.

VIII.

As a final matter, I consider whether plaintiff's request for preliminary injuntive relief should be granted pending resolution of the state law issues. Although the parties have proceeded to trial in this case without a preliminary injunction hearing, plaintiff did so at the court's request to expedite the case, and I therefore conclude that the request for such relief is ripe for decision at this time.

Two of the criteria that must be satisfied in order to demonstrate entitlement to a preliminary injunction are a showing of a likelihood of success on the merits and a showing that plaintiff will suffer irreparable harm without the injunction. *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). As to the likelihood of success on the merits, I conclude that the court could not make a determination favorable to the plaintiff without deciding issues

as to which I have concluded abstention is appropriate. As to irreparable harm, the parties have stipulated that Rule 111 will not be enforced pending the ruling by this court, *see* Stipulated Agreement of Facts Between the Parties at para. 3 (as amended Dec. 15, 1986). Since this court has abstained rather than ruling on the merits, this stipulation remains in force and plaintiff therefore cannot show that he will suffer irreparable injury without the preliminary injunction. I therefore conclude that plaintiff's prayer for a preliminary injunction should be denied.

I note that the denial of the preliminary injunction is a decision which creates grounds for an appeal under 28 U.S.C. § 1292(a)(1) (1984). It thus avoids an additional problem with the abstention doctrine — doubt about whether abstention orders are reviewable. *See* Field, *The Abstention Doctrine Today*, 125 U. Pa. L. Rev. 590, 592-601 (1977).

IX.

With respect to a precise form of order that effectuates the objectives of abstention while holding the doors of this court open to adjudication of plaintiff's federal constitutional claims if plaintiff does not obtain relief on his state claims after duly advancing them in state courts, I conclude that this action should be dismissed, but upon the following two conditions: first, the dismissal will be without prejudice on the merits; second, this court will retain jurisdiction to reopen the case upon motion supported by a showing that, after reasonable efforts to obtain relief (either preliminarily or permanently) under state law, plaintiff cannot obtain relief without resort to the federal constitutional claims asserted here. *See Harris County Comm'rs Court* v. *Moore*, 420 U.S. 77, 88-89 (1975).

/s/ Robert E. Keeton
United States District Judge

(2)

Supreme Court, U.S.
FILED
OCT 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-205.

In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

ROBERT GUINEY,
PETITIONER,

v.

FRANCIS M. ROACHE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent's Brief in Opposition.

KEVIN S. MCDERMOTT,*
JAMES F. HART,
ZARA KILMURRAY,
Legal Counsel to the
Boston Police Department,
154 Berkeley Street,
Boston, Massachusetts 02116.
(617) 247-4550
Attorneys for the Respondent,
Francis M. Roache

*Counsel of Record

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

15pp

Question Presented.

Whether the United States Court of Appeals for the First Circuit correctly held that Boston Police Department Rule 111, which rule establishes regulations for the random urinalysis drug testing of police officers who carry guns and interdict drugs, is constitutionally permissible under the Fourth Amendment.

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No. 89-205.

In the
Supreme Court of the United States.

OCTOBER TERM, 1989.

ROBERT GUINEY,
PETITIONER,

v.

FRANCIS M. ROACHE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent's Brief in Opposition.

The respondent, Francis M. Roache, as he is Police Commissioner for the City of Boston, Massachusetts, respectfully opposes the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case.

The respondent, Francis M. Roache, was appointed as Police Commissioner for the City of Boston in February of 1985. In response to the growth in the national epidemic in the illicit trafficking and use of drugs, and the deleterious effect it was having on the Boston Police Department, the respondent promulgated Boston Police Department Rule 111 on April 24, 1986, to be effective June 21, 1986. See *Guiney* v. *Roache*, 654 F. Supp. 1287 (D. Mass. 1987) (wherein the text of Rule 111 and the evidence and procedural history of the action are included), *vacated*, 833 F.2d 1079 (1st Cir. 1987).

The petitioner, Robert Guiney, in his capacity as president of the Boston Police Patrolmen's Association, filed a complaint in the United States District Court for the District of Massachusetts seeking a declaratory judgment that the drug testing program promulgated by Rule 111 violated the Fourth and Fourteenth Amendments to the United States Constitution. After first invoking abstention, 654 F. Supp. 1287 (1987), *vacated*, 833 F.2d 1079 (1st Cir. 1987), the district court held that portion of Rule 111 which provided for random drug testing was violative of the Fourth Amendment. 686 F. Supp. 956 (D. Mass. 1988). Subsequently, the First Circuit Court of Appeals vacated the ruling of the District Court. The Appeals Court held that, to the extent the drug testing program applies to police officers who carry guns and interdict drugs, the program is constitutional. Since the Department rule also included its civilian employees, the case was remanded to the District Court to clarify the rationale for including employees who may not carry guns and interdict drugs. 873 F.2d 1557 (1st Cir. 1989). On remand, the respondent amended Rule 111 so that it applies only to sworn police officers and not to civilian personnel.

Argument.

I. There Is No Conflict Between the Decision Below and Previous Decisions of This Court.

The First Circuit Court of Appeals correctly held that the random drug testing program of the Boston Police Department is permissible under the Fourth Amendment. It is critical to note that such drug testing program is not designed to serve the ordinary needs of law enforcement but is promulgated by the government, as employer, to detect and deter drug usage among its police officer employees. *National Treasury Employees Union* v. *Von Raab*, U.S. , 109 S.Ct. 1384, 1386, 103 L.Ed.2d 685 (1989) (NTEU).

In determining the reasonableness of non-criminal, workplace searches under the Fourth Amendment in the public employment setting the Court plurality in *O'Connor* v. *Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987) held "that public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work related misconduct, should be judged by the standard of *reasonableness under all the circumstances*." *Id.* at 1502 (emphasis added).

The Court plurality further found that the intrusion must be reasonable at its inception and in its scope. *Id.* at 1503. The Court did not reach the issue of whether individualized suspicion of misconduct is an essential element of the above stated standard of reasonableness. *Id.* at 1503. However, the Court majority did recognize that "[i]n the case of searches conducted by a public employer, we must balance the invasion of the employee's legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Id.* at 1499.

The issue of whether drug testing must be based upon individualized suspicion that an employee is using drugs was recently addressed in the companion cases of *Skinner* v. *Railway Labor Executives' Association*, U.S. , 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (RLEA) and *National Treasury Employees Union* v. *Von Raab*, U.S. , 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). The Court held that the public interest must be balanced against the individual's privacy concerns implicated by the drug testing to determine whether a warrant, or probable cause or some level of individualized suspicion is required in this particular context. *NTEU* v. *Von Raab*, 109 S.Ct. at 1386 citing *Skinner* v. *RLEA*, 109 S.Ct. at 1413-1414 (1989). The Court then held the drug testing programs in both cases to be reasonable in the absence of probable cause or individualized suspicion.

Justice Kennedy, writing the majority opinion in the *Von Raab* case, *supra*, addressed three factors which tipped the balance favor of allowing the government to drug test specific classes of employees. First, the Court looked at the compelling interest of the government in insuring that its front-line personnel, who are interdicting drugs and carrying firearms, are physically fit and have unimpeachable integrity and judgment. In light of the evidence demonstrating a national crisis in law enforcement caused by the smuggling of illicit narcotics, government concern outweighed the privacy interests of those front-line personnel. *Id.* at 1391.

Secondly, the Court viewed the purpose of the drug testing program more a deterrent to drug usage than as a vehicle to detect those persons using drugs. "The mere circumstance that all but a few of those tested are innocent does not impugn the program's validity. The [Custom] Service's program is designed to prevent the promotion of drug users as much as designed to detect those employees who use drugs" *Id.* at 1395.

Finally, the Court found the scope of the search was not unjustifiably intrusive on Fourth Amendment protections. "Where, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes ample justification for reasonable searches calculated to advance the government's goal." *Id.* at 1396.

The Supreme Court's analysis in *Von Raab, supra,* is applicable to the drug testing of Boston police officers. It is axiomatic that society has a compelling interest in a drug-free police department. The very essence of the job of a police officer is to prevent and combat criminal activity. When a police officer fails to report incidents of illicit drug use, or worse, when the officer himself uses illicit drugs, he places himself in league with the criminals he is sworn to apprehend. He is not morally, mentally or physically fit to perform the duties of a police officer. An officer who uses drugs is a criminal. Yet he is one who is empowered with a gun and a badge and the authority of the sovereign. The danger of that situation needs no elaboration.

There is also the compelling public interest in safety as those police officers targeted for drug testing carry guns, engage in high-speed pursuits and combat drug traffickers in streets and neighborhoods of the city. These police officers are also entrusted with the "most awesome and dangerous power that a democratic state possesses with respect to its residents . . . the power to use lethal force to arrest and detain them". *Policeman's Benevolent Association* v. *Washington*, 850 F.2d 133, 141 (3d Cir. 1988).

As in *Von Rabb, supra,* the aim of the drug testing program of the Boston Police Department is to deter drug usage among its officers as well as to detect it. The respondent submits that random drug testing is the only effective means to achieve its goal. In *Transit Workers' Union, Local 234* v. *SEPTA*, 678 F. Supp. 543 (E.D. Pa. 1988) the court upheld random drug

testing for several categories of workers, including police officers. After months of debate and conflicting concerns regarding the random aspect of the testing program the court appointed an independent expert to review the testing proposal and report to the court. The court found that testing based on individualized suspicion had not been enough to satisfy the needs of public safety. It also found that to be an effective deterrent, testing must be random, unannounced and done daily. *Id.* at 549. The reason that random testing is effective is because its aim is to detect chronic abusers rather than actual impairment. Drug abusers would be able to stay drug free for a period of time if the tests were announced in advance. As urinalysis tests only for recently ingested drugs, drug abusers would otherwise escape detection. *Id.* at 549. The *SEPTA* court held that although drug screening by urinalysis is a serious infringement on an individual's reasonable expectation of privacy, the urinalysis of SEPTA's operating employees is not so intrusive or unreasonable as to fail to withstand constitutional scrutiny. *Id.* at 548. See also *Harmon* v. *Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989) (Court allowed random testing after declining to draw distinction between random testing and testing after a particular event.); *Skinner, supra,* 109 S.Ct. 1407-1408 (Court noted a number of federal agencies have found random testing as the most effective means to effectuate their goals.)

The Boston Police Department's drug testing program, as promulgated by Rule 111, was drafted specifically to address concerns for privacy, accuracy and arbitrariness. The selection of personnel to be tested is completely random. A statistical protocol for selection will be developed which will be computerized. There will be no discretion involved and therefore, no arbitrariness in the manner of selection. See *Lovvorn* v. *Chattanooga*, 647 F.Supp. 875, 881 (E.D. Tenn. 1986) (the trial court noted the absence of standards for the methods of

conducting the tests. It would apparently permit random tests where the tests were not subject to "standardless discretion"). See also *Delaware* v. *Prouse*, 440 U.S. 648, 655, 99 S.Ct. 1391, 1396-1397 (1979) (where the concern was that there was too much discretion as to who, what, when, where and in what manner to conduct a search).

Personnel responsible for the collection of samples will be trained and will not observe an employee during urination, which takes place in a private stall. See *Mullholland* v. *Department of the Army*, 660 F. Supp. 1565, 1569, 1576 (E.D. Va. 1987). An optimum amount of confidentiality is maintained. *NTEU* v. *Von Raab*, 109 S.Ct. at 1394. There are confirmatory tests and the employee may independently test an aliquot portion of the sample. See *Banks* v. *Federal Aviation Administration*, 687 F.2d 92, 95 (5th Cir. 1982). The confirmation procedure utilizes a gas chromatography/mass spectrometry tests which is considered to be the most accurate technology available. See *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 555 (Fed. Cir. 1986). A detailed chain of custody provides assurances against the mislabeling of a sample. See *Rushton* v. *Nebraska Public Power Dist.*, 653 F. Supp. 1510, 1526 (D. Neb. 1987). Rule 111 also provides that an advisory committee be set up which will include representatives from labor and this committee will consult and advise the Commissioner on the most effective and least intrustive methodology to implement. See *Transit Workers' Union, Local 234* v. *SEPTA*, 678 F. Supp. 543 (E.D. Pa. 1988). Further, Rule 111 provides for substantive due process rights by requiring that prior to the imposition of any discipline, the Department must first determine there to be just cause to find a knowing violation of drug ingestion. (Rule 111, section 12, as amended.) Further, Rule 111 is drug specific: that is it tests only for four specific drugs in the urine. This limits the intrusiveness of the search.

In light of the foregoing, the measures adopted in Rule 111 are reasonably related to the object of the search (i.e., deterring drug usage) and are not excessively intrusive. Therefore, the search is reasonable in its scope.

A search is reasonable in its scope when " 'the measures adopted are reasonably related to he objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].' " *O'Connor* v. *Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 1503 (1987), quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 744 (1985).

The petitioner fails to appreciate that the drug testing program at issue involves the government acting as an employer rather than the government exercising its law enforcement function. That is why petitioner relies on *Schmerber* v. *California*, 384 U.S. 757 (1966) and *Winston* v. *Lee*, 470 U.S. 753 (1985) for the proposition that compelled bodily intrusions implicate the most personal and deep-rooted expectations of privacy. (Petition at 5.) Those cases dealt respectively with the exclusion of a compelled blood sample of the defendant as evidence in the defendant's criminal trial and the constitutionality of the surgical removal of a bullet from the chest of a suspected felon. In the instant action there is no possibility of criminal sanctions against the tested police officers. The goals of the government as well as the expectation of privacy of those employees subject to testing are different when the government acts as an employer rather than an enforcer of the law. As the Court stated in *Von Raab, supra*:

> Customs employees . . . who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should

> expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the service personal information that bears directly on their fitness. While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

Id. at 1394.

The respondent, police commissioner, contends that the Constitution does not require a police officer first to be involved in an incident involving a car or a gun before an employer can administer urine testing, so that the random drug testing program is justified. The circumstances of employment must be viewed in determining the reasonableness of the search. *O'Connor* v. *Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 1501 (1987).

II. Massachusetts Constitution, Article 14, Provides More Substantive Protections than the Fourth Amendment.

In further opposition to a writ of certiorari it is noteworthy that the petitioner has a state constitutional claim under the Massachusetts Constitution's Declaration of Rights, Article 14 which the petitioner may still choose to present to the Massachusetts Supreme Judicial Court should this Court affirm the decision of the First Circuit Court of Appeals. This is so because

Article 14, although nearly identical to the Fourth Amendment, has been held to give individuals more substantive protections than the Fourth Amendment. *Commonwealth* v. *Upton*, 394 Mass. 373, 476 N.E.2d 548, 556 (1985); *Commonwealth* v. *Trumble*, 396 Mass 81, 86, 483 N.E.2d 1102, 1105 (1985); *Horsemen's Benevolent and Protective Association, Inc.* v. *State Racing Commission*, 403 Mass. 692, 703, 532 N.E.2d 644, 650 (1989). In a predecessor decision to the instant action which dealt with the appropriateness of abstention, the First Circuit indicated "that the Massachusetts courts would likely approach an Article 14 challenge to Rule 111 in much the same way that a federal court would approach to challenge to Rule 111 under the Fourth Amendment." *Guiney* v. *Roache*, 833 F.2d 1079, 1082 (1st Cir. 1987). Such a forecast of the law proved correct as the Supreme Judicial Court applied the Fourth Amendment balancing test when determining the constitutionality of a drug testing program for jockeys under *Horsemen's Benevolent and Protective Association, Inc.* v. *State Racing Commission*, 403 Mass 692, 704, 532 N.E.2d 644, 651 (1989).

Although a consideration of the random drug testing program under Article 14 is likely to have the same result as an analysis under the Fourth Amendment it is respectfully brought to the attention of this Court that its determination of the present action is not necessarily the final determination as the petitioner has an independent state claim which he may choose to invoke in the Massachusetts Supreme Judicial Court.

Conclusion.

For all the foregoing reasons, the respondent opposes the petition for a writ of certiorari to the First Circuit Court of Appeals.

Respectfully submitted,

KEVIN S. McDERMOTT,*
JAMES F. HART,
ZARA KILMURRAY,
Legal Counsel to the
Boston Police Department,
154 Berkeley Street,
Boston, Massachusetts 02116.
(617) 247-4550
Attorneys for the Respondent,
Francis M. Roache

*Counsel of Record